CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 385

ATLANTIC COAST LINE RAILROAD COMPANY,
APPELLANT,

vs.

M. E. THOMPSON, STATE REVENUE COMMISSIONER
OF THE STATE OF GEORGIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

FILED AUGUST 10, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 385

ATLANTIC COAST LINE RAILROAD COMPANY, APPELLANT,

vs.

M. E. THOMPSON, STATE REVENUE COMMISSIONER OF THE STATE OF GEORGIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

INDEX

	Original	Print
Proceedings before Department of Revenue of Georgia	1	1
Notice of proposed adjustment in tax liability	1	1
Protest to proposed adjustment in tax liability	3	3
Notice of denial of petition for redetermination of deficiency	9	7
Notice of assessed deficiency and computation of tax	10	8
Record from Superior Court of Chatham County	23	18
Appeal from judgment of State Revenue Commissioner	23	18
Cost bond on appeal (omitted in printing)	25	18
Agreement to pay all taxes for which liability has been admitted (omitted in printing)	26	18
Order substituting party appellee	27	19
Amendment of appeal	28	19
Special plea of appellee	31	22
Opinion, Humphrey, J.	41	29
Judgment	42	30
Motion for new trial	44	30
Exhibit "A"—Excerpts from special plea of appellee	50	35
Order denying motion for new trial	55	39
Statement of evidence	56	40
Testimony of H. E. Judge	56	40
Agreed statement of facts	59	42
Exhibit No. 1—Lease, The Georgia Railroad & Banking Co. to William M. Wadley, May 1, 1881	67	48

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 9, 1946.

—7546.

	Original	Print
Record from Superior Court of Chatham County—Continued		
Affidavits of F. B. Popp	77	56
Proposed adjustments of tax liability	80	58
Letters as to ad valorem tax returns	93	67
Extract from agreed statement of facts in case of Wright vs. L. & N. R.R. Co., et al. in Supreme Court of the United States	95	67
Extract from Valuation Docket No. 312 of Interstate Commerce Commission	96	68
Proceedings in Supreme Court of Georgia	97	69
Bill of exceptions and order thereon	97	69
Exhibit "A"—Excerpts from special plea of appellee	103	74
Opinion, Duckworth, J.	110	78
Judgment	124	89
Petition for appeal	125	89
Assignments of error	131	93
Order allowing appeal, etc.	138	99
Supersedeas and cost bond on appeal (omitted in printing)	140	100
Citation (omitted in printing)	149	100
Praecipe for transcript of record	152	100
Additional portions of record designated by appellee	155-A	103
Original bill in case of Georgia Railroad and Banking Co. vs. Wright in Circuit Court of the United States for the Northern District of Georgia	179	103
Original bill in case of L. & N. R.R. Co., et al. vs. Wright in Circuit Court of the United States for the Northern District of Georgia	190	112
Final decree of District Court of the United States, Northern District of Georgia, in case of L. & N. R.R. Co. et al. vs. Wright, July 18, 1912	200	121
Appellee's designation of additional portions of record	211	122
Clerk's certificate (omitted in printing)	214	124
Statement of points to be relied upon and designation of record	215	124
Appellee's designation of additional parts of record	220	127
Order noting probable jurisdiction	222	128

[fol. 1]

DEPARTMENT OF REVENUE, STATE OF GEORGIA.

J. Eugene Cook, Commissioner.

Notice of Proposed Adjustment in Tax Liability

Atlanta, November 15, 1944.

In your reply refer to ITA:REC:LH.

Atlantic Coast Line Railroad Company,
Wilmington, North Carolina.

ITA—10588.

Dear Sirs:

There is attached a statement of adjustments which this office proposes to make in your income tax liability for the years in question as follows:

Year.	Additional Tax	Penalty	Interest	Total
1941	35,465.46	-0-	5,851.80	41,307.26
1942	86,766.14	-0-	9,110.45	95,876.59
1943	57,040.20	-0-	2,566.82	59,607.02
Totals	$179,271.80	-0-	$17,529.07	$196,800.87

If the adjustments are satisfactory you should immediately notify this office of your acceptance by signing and returning Form A-30 enclosed herewith, and mail remittance immediately.

If you do not agree with the conclusions set forth in the enclosed report, you have a right to file a petition for redetermination of said proposed tax liability within thirty days from the date of this notice. The protest should set forth all the reasons of law and facts, executed in duplicate, under oath, and should contain the following information:

(a) The name and address of the taxpayer.

(b) The file number shown above.

(c) The year or years involved.

(d) An itemized schedule of the findings to which the taxpayer takes exception.

(e) A summary statement of the grounds upon which [fol. 2] the taxpayer relies in connection with each exception.

(f) In case the taxpayer desires a hearing, a statement to that effect, and if you are represented by an attorney or accountant, power of attorney must be presented.

If no protest is filed within the thirty-day period, the adjustments will be made as indicated and the additional tax and interest will be assessed.

Respectfully, Department of Revenue, By: R. E. Collings, Jr., Agent, in charge Income Tax Unit.

Registered Mail.

[fol. 3] PROTEST

December 11, 1944.

DEPARTMENT OF REVENUE, STATE OF GEORGIA, ATLANTA GEORGIA.

(Received Income Tax Unit Dec. 14, 1944—Dept. of Revenue, Ga.).

To the Honorable J. Eugene Cook, Commissioner:

Re: Income Tax Returns, Atlantic Coast Line Railroad Company, Wilmington, North Carolina. ITA:10588.

Protest of Atlantic Coast Line Railroad Company against deficiencies for years 1941, 1942, 1943, proposed to be assessed against it in the following amounts:

Year	Additional Tax	Penalty	Interest	Total
1941	35,465.46	-0-	5,851.80	41,317.26
1942	86,766.14	-0-	9,110.45	95,876.59
1943	57,040.20	-0-	2,566.82	59,607.02
Totals.....	$179,271.80	-0-	$17,529.07	$196,800.87

Now comes Atlantic Coast Line Railroad Company and files its petition for redetermination of the deficiencies in income tax proposed to be assessed against it by the Department of Revenue of the State of Georgia, and hereby protests the same and for grounds shows:

1. Notice of said proposed deficiency assessment is contained in a letter dated November 13, 1944 (ITA: 10588), signed on behalf of the Department of Revenue by R. E. Collings, Jr., agent in charge, income tax unit.

The name and address of your petitioner is Atlantic Coast Line Railroad Company, a railroad and public utility corporation organized under the laws of the State of Virginia, and having its principal office at Wilmington, North Carolina.

3. The file number shown is ITA: 10588.

[fol. 4] 4. The years involved are the calendar years which ended December 31, 1941, 1942, and 1943.

5. An itemized schedule of the findings of the Department of Revenue, to which your petitioner protests and takes exception to as erroneous, is as follows:

Cause of additional tax contained in preliminary statement as follows:

Inclusion of net income from the entire operation of the separately operated and jointly leased railroad properties known as the Georgia Railroad.

The adjustment to net income contained in said proposal is based upon the inclusion of the entire net income from the operation of Georgia Railroad in accordance with the provisions of the act of the General Assembly of the State of Georgia approved March 5, 1931, and all acts amendatory thereof.

Schedule No. 1—Net Income and computation of tax, Calendar Year 1941.

(a) Additional income from Georgia Railroad for calendar year 1941		$ 644,826.51
Net income as corrected		1,480,455.26
Income tax at 5½%		81,425.04
(b) Deficiency to December 15, 1944		41,317.26

Schedule No. 2—Net income and computation of tax for Calendar Year 1942.

(a) Additional income — Federal income tax	259,265.20	
(b) Income from Georgia R.R.	1,777,531.19	2,036,796.39
(c) Deduction—Federal income tax allowable		459,230.32
Net income as corrected		6,923,466.95
Income tax at 5½%		380,790.69
Deficiency to December 12, 1944		95,876.59

Schedule No. 3—Net income and computation of tax, Calendar Year 1943.

(a) Additional income—		
[fol. 5] Federal income tax	2,786,010.46	
(b) Income from Georgia R.R.	1,859,267.88	4,645,278.34
(c) Deduction—Federal income tax		3,608,183.70
Net income as corrected		7,361,042.38
Income tax at 5½%		404,857.33
Deficiency to December 15, 1944		59,607.02

Exhibit A—Computation of Federal income tax deduction.

Calendar years	1942	1943
Net income taxable by the State of Georgia for preceding year	1,480,455.26	6,923,466.95
Net income taxable by Federal Government on the return filed for preceding year	7,625,568.21	38,421,401.64
Ratio of net income taxable by Georgia to net income taxable by Federal Government	19.41%	18.02%
Amount of Federal income tax paid for preceding year	2,365,947.05	20,023,217.51
Amount allowable	459,230.32	3,608,183.70

6. A summary statement of the grounds upon which your petitioner relies for its exceptions and protests is as follows:

Your petitioner contends that the income of the Georgia Railroad main line and Athens branch for the years 1941, 1942, and 1943, is tax exempt by virtue of the irrepealable contract in the charter of that railroad granted in 1833 and is not to be used in any manner in preparing the income tax returns of your petiitoner to the State of Georgia.

The losses from operations of the other branch lines of the Georgia Railroad not covered by the charter of 1833 were:

$497,285.82 in the year 1941,
526,374.76 in the year 1942,
677,952.28 in the year 1943.

[fol. 6] and your petitioner, as one of two joint lessees, contends that these are lawful deductions and that it is entitled to deduct one half of these amounts in its returns for the years in question.

Petitioner says that the action of the department of revenue in thus seeking to diminish the losses sustained by operation of that portion of the Georgia Railroad not covered by the charter exemption of 1833 amounts to the imposition of the State income tax on the income received from the operation of a railroad whose charter specifically exempted it from all taxation except the one tax named in the charter, to wit: one half of one per cent, per annum of the net proceeds of the investment.

To so use tax exempt income is to tax your petitioner, as one of the joint lessees of the Georgia Railroad, on the income received by your petitioner from the operations of the main line and Athens branch of said railroad and imposes a burden of taxation upon said properties of the Georgia Railroad & Banking Company and the stockholders thereof, for a tax upon the income received by a lessee of said Georgia Railroad necessarily impairs the ability of the Georgia Railroad & Banking Company to lease the Georgia Railroad (as it is expressly permitted to do under the charter) and decreases the amount of rent which the Georgia Railroad & Banking Company may receive from said property. The purpose of the State of Georgia in granting said charter to the Georgia Railroad & Banking Company and inserting therein the provisions concerning taxation was to encourage that corporation to build and develop its railroad under the promise that it would receive and retain for itself all of the profits thereof subject only to the burden of the tax provided by its charter. The corporation was to build its road with the promise that its profits from said road would be burdened only by the tax provided in its charter. The charter of [fol. 7] the corporation expressly granted to it the right to lease its railroad. Any tax imposed upon the profits received by the lessee necessarily affects the profits that the corporation will receive from its railroad, and thereby imposes upon the corporation the burden of taxation not permitted by its charter. It is a violation of article I, § 10, cl. 1 of the constitution of the United States and of article I, § 3, p. 2, of the constitution of the State of Georgia to impose said tax, because the charter of the

Georgia Railroad & Banking Company constitutes a contract and the imposition of the proposed tax on your petitioner will be a violation of the obligation of said contract, contrary to said constitutional provisions.

7. Your petitioner further protests said proposed assessments and contends that it has paid all income taxes due by it to the State of Georgia for the years 1941, 1942, and 1943.

8. Your petitioner further protests said proposed assessments for the reason that the department of revenue proposes to tax all of said income of the Georgia Railroad, including the main line and Athens branch, for each of the years at the rate of 5½%—all in addition to the tax paid by your petitioner under the charter requirements; that said proposal is contrary to the law and contrary to the method of taxation fixed by the charter of the Georgia Railroad & Banking Company.

9. Your petitioner further protests said proposed assessments for the reason that the commissioner declined to recognize petitioner's claims of tax immunity as contained in the charter granted by the State of Georgia to the Georgia Railroad & Banking Company by act approved December 21, 1833; your petitioner having acquired a one-half interest in the lease dated May 7, 1881, between Georgia Railroad & Banking Company and William W. Wadley, and having succeeded to his rights and is [fol. 8] thereby vested with all the rights, powers, privileges and immunities granted by the State of Georgia to the Georgia Railroad & Banking Company by said charter and by said company in the lease to the said William W. Wadley.

Wherefore, petitioner prays: That this its protest and petition for redetermination be ordered filed and that it have the right to amend this petition and protest in any respect, either by way of specifying the statements of fact herein contained or adding additional grounds thereto;

That the department of revenue reconsider its action in assessing petitioner in those amounts to which exception is taken in this protest and that, after reconsideration, those amounts to which this protest is directed, and which constitute the assessment to which petitioner is objecting, be stricken and that the assessment made in the thirty-day letter to which this protest is filed be amended

in accordance with this protest, and that said proposed assessments be abandoned and that no assessments in any amount be made.

Petitioner desires a conference at such time as may be mutually agreeable to petitioner and the department of revenue.

Atlantic Coast Line Railroad Company, by Lewis F. Ormond, Comptroller.

Alston, Foster, Sibley & Miller, Attorneys for Petitioner.

[fol. 9]

DEPARTMENT OF REVENUE, STATE OF GEORGIA

J. M. FORRESTER, Commissioner

NOTICE OF DENIAL OF PETITION FOR REDETERMINATION OF DEFICIENCY

Atlanta, March 5, 1945.

In your reply refer to IT:REC:MAC.

ATLANTIC COAST LINE RAILROAD COMPANY,
Wilmington, North Carolina.

Att'n. Mr. Lewis F. Ormond, Comptroller. In re: ITA:10588.

Gentlemen:

Pursuant to section 92-3302 of 1933 Code of Georgia, you are hereby given notice that the department of revenue has considered your petition for redetermination of deficiency in your income tax as shown by our notice to you dated November 15, 1944, has denied your petition and has redetermined the deficiency as follows:

Year ending December 31, 1941	$ 41,317.26
Year ending December 31, 1942	95,876.59
Year ending December 31, 1943	59,607.02
Year ending	
Year ending	
Total additional tax due	$196,800.87

Unless the deficiency in tax is paid promptly the department of revenue will make assessment thereof and proceed with the collection of the amount.

Respectfully, Department of Revenue, By: R. E. Collings, Jr., Director Income tax unit.

CC: Mr. Philip H. Alston, C. & S. National Bank Bldg., Atlanta, Ga.

[fol. 10]

DEPARTMENT OF REVENUE, STATE OF GEORGIA
J. EUGENE COOK, Commissioner.

NOTICE OF ASSESSED DEFICIENCY

In your reply refer to IT:LSR:C.

March 5, 1945.

ATLANTIC COAST LINE RAILROAD COMPANY,
Wilmington, North Carolina.

ITA: 10588.

Gentlemen:

On November 15, 1944, we sent you notice of determination of deficiency in income tax for the years ending Dec. 31, 1941, 1942, and 1943.

You are hereby notified that the department of revenue has assessed deficiency in income tax against you for the following years:

Year ending	1941	Principal	$35,465.46	
		Penalty		
		Interest	6,383.78	
	Total assessment			$ 41,849.24
Year ending	1942	Principal	$86,766.14	
		Penalty		
		Interest	10,411.94	
	Total assessment			$ 97,178.08
Year ending	1943	Principal	$57,040.20	
		Penalty		
		Interest	3,422.41	
	Total assessment			$ 60,462.61
Total amount due to date of assessment				$199,489.93

Demand is hereby made on you for the payment of the amounts within ten days from the date of this notice.

You are hereby notified that unless the assessment is paid within the time specified, fi. fa. will be issued against you as provided by law.

[fol. 11] The total amount of the assessment bears interest at the rate of 1% per month from the date of the assessment until paid.

Respectfully, Department of Revenue, By: Lee S. Bradford, Chief Clerk Income Tax Unit.

CC: Mr. Philip H. Alston, C & S National Bank Bldg., Atlanta, Georgia.

[fol. 12] COMPUTATION OF TAX

Atlantic Coast Line Railroad Company
Wilmington, North Carolina.

Preliminary Statement.

Taxpayer is a Virginia corporation, engaged in the business of rail transportation,—and doing business within and without the State of Georgia.

Years examined: Calendar years 1941, 1942 and 1943.

Cause of additional tax:—Inclusion of net income from the entire operation of the separately operated, and jointly leased railroad properties, known as the Georgia Railroad. Taxpayer acquired a one-half interest in said lease through the following channel: By indenture dated May 7, 1881, the railroad properties of the Georgia Railroad and Banking Company were leased to William W. Wadley, and his assigns. By assignment dated May 17, 1881, Louisville and Nashville Railroad Company acquired a one-half interest in the lease, and subsequently became the sole lessee. By an instrument dated August 9, 1899, Louisville and Nashville Railroad Company assigned a one-half interest in the lease to Atlantic Coast Line Railroad Company from and after July 1, 1899. The properties held under the lease are separately operated by an un-incorporated organization created by L. & N. R. R. Company and A. C. L. R. R. Company, and known as Georgia Railroad.

Taxpayer claims that such tax immunity, if any, granted by the charter to the Georgia Railroad and Banking Com-

pany by act approved December 21, 1833, is assignable to it, in so far as the main line and the Athens branch of said Georgia Railroad is concerned, and for that reason excluded the net operating revenues from its return of income, filed with the State of Georgia for the years 1941, 1942, and 1943.

The adjustment to net income, contained in the following proposal is based upon the inclusion of the entire net income from the operation of Georgia Railroad, in ac- [fol. 13] cordance with the provisions of the act of the General Assembly of the State of Georgia approved March 5, 1931, entitled "An act to provide for levying, assessing, and collecting a tax on net income; to provide how returns shall be made, how the tax shall be paid; to fix penalties for the violation hereof; to raise revenue for the State; to provide for refunds; and for other purposes," and all acts amendatory thereof.

Atlantic Coast Line Railroad Company Page No. 2.

Schedule No. 1

Net income and computation of tax,
Calendar Year 1941.

Net income, per return	$ 835,628.75
Add:	
(a) Income from Georgia Railroad	644,826.51
Net income, as corrected	1,480,455.26
Income tax at 5½%	81,425.04
Less: Tax previously paid	45,959.58
Additional Tax	35,465.46
Interest at 6% to 3/15/45	6,383.78
Deficiency to 3/15/45	41,849.24

Schedule No. 1-A

Explanation of Item Changed in Schedule No. 1

(a) Income from Georgia Railroad 644,826.51

Taxpayer corporation is the joint owner of lease of the railroad properties of the Georgia Railroad and Banking

Company, having acquired a one-half interest in said lease from the Louisville and Nashville Railroad Company as of July 1st, 1899. In reporting net income for the current year, taxpayer reported only the income from the Macon branch and the Washington branch of said Georgia Railroad,—claiming a net deductible loss of $248,642.91, and excluding therefrom the income derived from the opera- [fol. 14] tion of the main line and the Athens Branch of said Georgia Railroad. The net income from the entire operation of the separately operated, unincorporated organization leased jointly with the Louisville and Nashville Railroad Company, and known as the Georgia Railroad, for the year 1941, as shown by exhibit "B" attached hereto, was $792,367.19. Taxpayer's 50% participation being $396,183.60, thus resulting in an increase of taxable income to Georgia of $644,826.51, computed as follows:

Taxpayer's share of net income from operation of Georgia Railroad (Exhibit B)	396,183.60
Loss claimed from operation of Macon and Washington branches (per return)	248,642.91
Increase, as above	644,826.51

Schedule No. 2

Net income and computation of tax
Calendar year 1942.

Net income, per return		5,345,900.88
Add: (a) Federal income tax	259,265.20	
(b) Income from Georgia Railroad	1,777,531.19	2,036,796.39
		7,382,697.27
Deduct:		
(c) Federal income tax allowable		459,230.32
Net income as corrected		6,923,466.95
Income tax at 5½%		380,790.69
Less: Tax previously paid		294,024.55
Additional tax		86,766.14
Interest at 6% to 3/15/45		10,411.94
Deficiency to 3/15/45		97,178.08

Schedule No. 2-A

Explanation of items changed in Schedule No. 2

[fol. 15] (a) and (c) Federal income tax

To adjust the deduction of Federal Income Tax allowable, in accordance with section 93-5109 (c) of the act of 1931, as amended. See Exhibit "A" for details.

(b) Income from Georgia Railroad 1,777,531.19

Same general explanation as that given in Schedule No. 1-A (a) applicable to the following amounts:

Taxpayer's share of net income from operation of Georgia Railroad (Exhibit B-1)	1,514,343.81
Loss claimed from operation of Macon and Washington branches (per return)	263,187.38
Increase as above	1,777,531.19

Schedule No. 3

Net Income and Computation of Tax Calendar Year 1943.

Net income, per return		6,323,947.74
Add:		
(a) Federal income tax	2,786,010.46	
(b) Income from Georgia Railroad	1,859,267.88	4,645,278.34
		10,969,226.08
Deduct:		
(c) Federal income tax		3,608,183.70
Net income tax as corrected		7,361,042.38
Income tax at 5½%		404,857.33
Less: Tax previously paid		347,817.13
Additional tax		57,040.20
Interest at 6% to 3/15/45		3,422.41
Deficiency to 3/15/45		60,462.61

[fol. 16] Schedule No. 3-A

Explanation of items changed in Schedule No. 3

(a) and (c). Federal Income Tax.

To adjust the deduction of Federal Income Tax allowable, in accordance with section 93-3109 (c) of the act of 1931, as amended. See Exhibit "A" for details.

(b) Income from Georgia Railroad 1,859,272.88

Same general explanation as that given in Schedule No. 1-A (a) applicable to the following amounts:

Taxpayer's share of net income from operation of Georgia Railroad (Exhibit B-2)	1,520,291.74
Loss claimed from operation of Macon and Washington branches (per return)	338,976.14
Increase as above	1,859,267.88

Exhibit A

Computation of Federal Income Tax Deduction.

Calendar years	1942	1943
Net income taxable by the State of Georgia for preceding year	1,480,4[illegible].26	6,923,466.95
Net income taxable by Federal Government on the return filed for previous year	7,625,568.21	38,421,401.64
Ratio of net income taxable by Georgia to net income taxable by Federal Government	19.41%	18.02%
Amount of Federal Income Tax paid for preceding year	2,365,947.05	20,023,217.51
Amount allowable	459,230.32	3,608,183.70

The taxpayer may only deduct Federal income taxes paid in the same proportion that the net income taxable by the State of Georgia bears to the net income taxable by the Federal Government. Section 92-3109 (c) of the State Income tax act.

[fol. 17]

Exhibit B.

Net Income—Georgia Railroad—As reported to Federal Government Calendar Year 1941.

Net revenue from railway operations			1,659,114.04
Add:			
Joint Facility and Equipment rents—net			1,635.77
Interest			272.43
Other income			37,898.41
Profit and Loss credits			
Vouchers, Accts. etc. written off			159.08
Other additions:			
Charges to income for property retired			403.15
			1,699,482.88
Deductions:			
Taxes other than income and profits tax		221,112.28	
Rent for leased roads		604,516.00	
Other rents		293.00	
Interest		48,607.47	
Misc. income charges		50.00	
		874,578.75	
Profit and Loss Debits:			
Loss on removal and demolition of property	25,756.19		
Uncollectible accounts written off	1,157.34		
Payment of accounts previously written off	22.65	26,936.18	
Other Deductions:			
Amount credited to income and charged to investment in road and equipment	154.69		
[fol. 18] Income from Railroad Credit Corp.	.07		
Charges to income to create operating reserves in recess of charges to reserves	5,446.00	5,600.76	907,115.79
Net taxable income			792,367.19
Atlantic Coast Line R. R. Co. (½)			396,183.60

Exhibit B-1

Net Income—Georgia Railroad—As Reported to Federal Government. Calendar Year 1942.

Net revenue from railway operations			4,096,598.35
Add:			
Interest			535.65
Other income			38,779.12
Profit and Loss Credits:			
Collection of accounts previously written off		23.00	
Vouchers, accounts, etc. written off		14.56	37.56
Other additions:			
Charges to income for property retired			2,341.68
			4,138,292.36
Deductions:			
Taxes other than income and profits tax		296,563.44	
Joint Facility and Equipment rents—net		134,300.32	
Rent for leased roads		604,506.00	
Other rents		293.00	
Interest		35,913.03	
Misc. income charges		50.00	
		1,071,625.79	
Profit and Loss Debits:			
[fol. 19] Loss on removal and demolition of property	37,126.88		
Uncollectible accounts written off	53.30		
Payment of accounts previously written off	6.34	37,186.52	
Income from R. R. Credit Corp.— Capital loss M & O R.R. Co. notes	838.65		
Loss net operating earnings	46.21	792.44	1,109,604.75
Net taxable income			3,028,687.61
Atlantic Coast Line R. R. Co. (½)			1,514,343.81

[fol. 20]

Exhibit B-2

Net Income—Georgia Railroad—As Reported to Federal Government. Calendar Year 1943.

Net revenue from railway operations			4,127,814.08
Add: Roadway depreciation (per books)			77,556.72
			4,205,370.80
Add:			
Interest			8.15
Other income			10,120.30
Profit and Loss Credits:			
Collection of accounts previously written off		269.42	
Vouchers, accounts, etc. written off		312.50	581.92
Other additions:			
Charges to income for property retired			21,657.83
			4,237,739.00
Deductions:			
Taxes other than income and profit tax		363,921.56	
Joint facility and equipment rents—net		213,600.74	
Rent for leased roads		604,510.00	
Other rents		293.00	
Interest		425.65	
Misc. income charges		50.00	
		1,182,800.95	
Profit and Loss Debits:			
Loss on removal & demolition of property	11,826.02		
Uncollectible accounts written off	41.58	11,867.60	
[fol. 21] Other deductions:			
Income from R. R. Credit Corp.—Capital loss on notes		2,486.96	1,197,155.51
Net taxable income			3,040,583.49
Atlantic Coast Line R. R. Company (½)			1,520,291.74

Georgia, Fulton County:

I, Eugene Cook, State Revenue Commissioner of Georgia, hereby certify that the following:

1. Statement of proposed adjustment in income tax liability, dated November 15, 1944.

2. Protest filed by Atlantic Coast Line Railroad Company, dated December 11, 1944.

3. Letter dated December 14, 1944, granting conference.

4. Notice of denial of petition and redetermination of deficiency, dated March 5, 1945.

5. Notice of assessed deficiency in income tax, dated March 5, 1945.

6. Schedules of net income and computation of tax for years 1941, 1942 and 1943.

are true and correct copies of said documents as they appear in the file of the department of revenue as a part of the record in the matter of ITA:10588, Atlantic Coast Line Railroad Company, Wilmington, North Carolina, upon which an appeal has been made to the superior court of Chatham County, Georgia.

This the 31 day of May, 1945.

Eugene Cook

Certified copies of parts of record Filed in office June 11th, 1945 J. Edward Way, Dep. Clerk S. C. C. C. Ga.

[fol. 22]

Department of Revenue
Income Tax Unit
Assessment Register.

Date March 5, 1945.

ITA No.	Year	Name and Address of Taxpayer	Amount Assessed
10588	1941	Atlantic Coast Line Railroad Co., Wilmington	41,849.24
10588	1942	Atlantic Coast Line Railroad Co., Wilmington	97,178.08
10588	1943	Atlantic Coast Line Railroad Co., Wilmington	60,462.61

[fol. 23] IN SUPERIOR COURT OF CHATHAM COUNTY, GEORGIA.

ATLANTIC COAST LINE RAILROAD COMPANY

vs.

J. EUGENE COOK, State Revenue Commissioner.

APPEAL OF ATLANTIC COAST LINE RAILROAD COMPANY FROM A JUDGMENT OF STATE REVENUE COMMISSIONER—Filed March 15, 1945

Comes now Atlantic Coast Line Railroad Company, the appellant in the foregoing case, a corporation organized and existing under the laws of the State of Virginia, having its principal place of business in Georgia, in Chatham County, and being dissatisfied with the judgment rendered by Honorable J. Eugene Cook, State Revenue Commissioner of the State of Georgia, on the 5th day of March, 1945, in the matter of assessment of income taxes against the appellant for the years 1941, 1942, and 1943, now entered on this the 12th day of March, 1945, its appeal therefrom to the superior court of Chatham County and to a jury in said court.

No costs have accrued in the above-styled case and appellant has given bond and security to appellee, the State Revenue Commissioner, for such further costs as may accrue by reason of this appeal. No further bond is required of appellant for the reason that it owns real property in Georgia, the value of which is in excess of the amount of the taxes in dispute. This appeal is entered within the time prescribed by law, and in accordance with section 45 of the act known as the administration of tax laws (1937-1938—Extra Sess. Laws, pg. 100), as amended.

This 12th day of March, 1945.

[fols. 24-26] Carl H. Davis, T. M. Cunningham, Alston, Foster, Sibley & Miller, Attorneys at law for Atlantic Coast Line Railroad Company.

I hereby certify that no costs have accrued in the above styled case, and appellant has given bond and security to the State Revenue Commissioner for such further costs

as may accrue by reason of such appeal, and that this appeal is entered on the 12 day of March, 1945.

Eugene Cook, State Revenue Commissioner.

[File endorsement omitted].

[fol. 27] IN SUPERIOR COURT OF CHATHAM COUNTY

ORDER SUBSTITUTING PARTY APPELLEE

The foregoing plea read and considered.

It is ordered that the said M. E. Thompson, commissioner of revenue of the State of Georgia, be substituted for J. Eugene Cook as appellee in the above styled cause as prayed, and that this plea and order be filed and become a part of the record in said case. This the 5 day of Nov., 1945.

R. H. Humphrey, Judge Superior Court M. C. Presiding.

[File endorsement omitted].

[fol. 28] IN THE SUPERIOR COURT OF CHATHAM COUNTY.

[Title omitted]

AMENDMENT OF APPEAL.

And now comes Atlantic Coast Line Railroad Company, appellant in the above stated case, and amends its appeal as follows:

1. Section 15 of the charter of Georgia Railroad and Banking Company, which provides for a tax "not exceeding one-half per cent per annum on the net proceeds of their investments," is an irrevocable and inviolable contract of the State of Georgia, and cannot be modified or changed by any subsequent legislative act of the State of Georgia, or any subsequent provision of the constitution of the State of Georgia; and the said income tax act of 1931, as applied by the State revenue commissioner so as to tax Atlantic Coast Line Railroad Company with the income of the main line of the Georgia Railroad from Augusta to Atlanta and the branch to Athens, which it receives as

lessee of the Georgia Railroad, is unconstitutional, null and void, and contrary to article 1, section X, paragraph I, of the constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts; and it is contrary to article I, section III, paragraph II of the constitution of the State of Georgia, which provides that no law impairing the obligation of contract shall be passed, and the assessments made by the State Revenue Commissioner under said income tax act of 1931 are, therefore, null and void.

2. If the State revenue commissioner is proceeding under any other act of the legislature, or provision of the constitution of the State of Georgia, passed subsequent to the acts of 1833, 1835, and 1837, under which the main line and [fol. 29] the Athens branch were built, such act or such provision of the constitution of the State of Georgia, is null and void, and contrary to Article I, section X, paragraph I of the constitution of the United States, with reference to the impairment of contracts and contrary to article I, section III, paragraph II, of the constitution of the State of Georgia, with reference to the impairment of contracts.

3. Article I, section III, paragraph III, of the constitution of 1877, as amended August 7, 1945, which provides that "all exemptions from taxation heretofore granted under corporate charters are declared to be henceforth null and void," is itself null and void when applied to the taxation under the income tax act of 1931 to Atlantic Coast Line Railroad Company of the income received by it as lessee of the Georgia Railroad from the main line and Athens branch of said Georgia Railroad; and it is contrary to article I, section X, paragraph I, of the constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts. In other words, the State of Georgia cannot avoid the prohibition in the constitution of the United States as to the impairment of the obligation of contracts by repealing its own contract, or declaring its own contract void, either through legislative or constitutional provision.

4. The said provision of article I, section III, paragraph III, of the constitution of 1877, as amended August 7, 1945, which provides that "all exemptions from taxation heretofore granted in corporate charters are declared to be hence-

forth null and void," is, by its own terms, not applicable to this case. It is in terms prospective and not retrospective. The State Revenue Commissioner is seeking to tax Atlantic Coast Line Railroad Company for income taxes under the act of 1931 on income received by it as lessee from the main line and Athens branch of the Georgia Rail-
[fol. 30] road for the years 1941, 1942, and 1943, which taxes accrued prior to the passage of said amendment of the constitution of 1877, which amendment was passed August 7, 1945.

5. Appellant, Atlantic Coast Line Railroad Company, pleads as res adjudicata on the provision that section 15 of the charter of Georgia Railroad and Banking Company is an irrevocable and inviolable contract and protected by the clauses of the Federal and State constitutions prohibiting the impairment of contracts.

(1) The decision in the case of Georgia Railroad and Banking Company v. The State of Georgia, filed in Fulton superior court, which was appealed to the Supreme Court of the United States in the case entitled, "State of Georgia v. Georgia Railroad and Banking Company," and reported in 54 Ga. 424.

(2) The decision in the case of Georgia Railroad and Banking Company v. Wright, filed in the United States District Court for the Northern District of Georgia, which was reported in 132 Fed. 912, and which was appealed to the Supreme Court of the United States and is reported under the title of "Wright v. Georgia Railroad and Banking Company," 216 U. S. 420. (3) 236 NS 687—(4) 248 NS. 525.

Carl H. Davis, T. M. Cunningham, Alston, Foster, Sibley & Miller, Attorneys for Atlantic Coast Line Railroad Company.

Amendment allowed this 5th day of November, 1945.

R. H. Humphrey, Judge S. C. M. C., Presiding.

[File endorsement omitted.]

[fol. 31] IN THE SUPERIOR COURT OF CHATHAM COUNTY.

[Title omitted]

SPECIAL PLEA OF APPELLEE—filed January 26, 1946.

Now comes the appellee in the above styled case and files this special plea and shows:

1

By the act approved December 21, 1833, the legislature of Georgia passed an act creating the Georgia Railroad Company, giving to it all the powers of a corporation and giving it authority to organize and to construct railroads and charge for the transportation of persons and merchandise. It also provided: "The stock of the company authorized and incorporated by this act, shall consist of fifteen thousand shares, of $100 each share, and the said company to be formed on that capital . . ."

Section XV of this act provided: "The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them; and after that, shall be subject to a tax not exceeding one half per cent per annum on the net proceeds of their investment."

Section XII authorized the Georgia Railroad Company to ". . . rent or farm out all or any part of their said exclusive right of transportation or conveyance of persons on the railroad or railroads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon, subject to the rates above mentioned."

2

For some reason the Georgia Railroad Company failed [fol. 32] to carry out the purpose for which it was created and the General Assembly by act approved December 18, 1835, created a new corporation, the Georgia Railroad and Banking Company, with powers as follows:

"Sec. 1. Be it therefore enacted, &c. That the stockholders of the Georgia Railroad Company, and such other persons as shall take stock under this act, and their successors and assigns, shall hereafter be a

body corporate by the name and style of the Georgia railroad and Banking Company, and by the said corporate name shall be, and are hereby made able and capable in law to have, purchase, receive, possess, enjoy, and retain, to them and their successors, lands, tents, tenements, hereditaments, goods, chattels, and effects of whatsoever kind, nature or quality the same may be, sufficient for the construction of banking houses, and the erection of the railroad only, and the same to sell, grant, demise, alien, or dispose of; to sue and be sued, plead and be impleaded; answer and be answered unto, defend and be defended in courts of record, and also to make and have a common seal, and the same to break, alter, or renew, at their pleasure, and also by and through the board of directors, to ordain, establish, and put in execution, such by-laws, rules and regulations as shall be necessary and convenient for the governing of said corporation, as to them may or shall appertain; Provided, that such by-laws, rules and regulations shall not be contrary to the laws and constitution of this State or of the United States, nor to the rules, regulations, restrictions, and limitations prescribed in this act."

"Sec. II. The stock of said company shall consist of two millions of dollars, one fourth of which, applied to banking purposes, shall be gold or silver coin, in shares of one hundred dollars each; of which capital, one half may be used for banking purposes, and not more until the completion of the road to Athens, [fol. 33] and one of the southern branches through Greensboro, to be designated by a vote of the stockholders at which time any capital stock unemployed may be used for banking purposes; provided, however, that the continuation of said road beyond Athens, so as to connect with the Cincinnati road, shall be steadily prosecuted so soon as the company shall have satisfactory evidence that the said connection can be formed."

"Section III. The directors of the Georgia Railroad Company for the time being, shall have power at their discretion to open books of subscription at such times and places as they may think proper, giving such notice in one or more of the public gazettes

of this State as they may deem necessary for additional subscriptions to the capital stock of said Georgia Railroad and Banking Company; on which subscriptions there shall be required to be paid at the time of subscribing, the amount per share, that may be prescribed by the directors aforesaid; and that the president and directors of the Georgia Railroad Company for the time being, shall be the president and directors of the new corporation until the time fixed for the annual election next thereafter."

By section XIV of the act of 1835 the General Assembly attempted to give all the rights to property acquired by the Georgia Railroad Company to the Georgia Railroad and Banking Company, this section reading as follows: "All the acts done and contracts made by the Georgia Railroad Company, are hereby declared to be of binding efficacy on the Georgia Railroad and Banking Company; and all the rights to property acquired by the Georgia Railroad Company, of whatsoever nature or kind the same may be, shall pass to and be vested in the Georgia Railroad and Banking Company as fully and completely as they are vested in the said Georgia Railroad Company." [fol. 34] That portion of section XV of the act of 1833 limiting the tax on the stock of the Georgia Railroad Company, to wit: "The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them; and after that, shall be subject to a tax not exceeding one half per cent per annum on the net proceeds of their investments." in so far as it applies to the claim of exemption of the appellant in this case is null and void and in conflict with the constitution of 1798, which constitution was in force at the time of the passage of said act, and its amendments for each of the following reasons:

1. The caption of said act of 1833 reads as follows: "An act to incorporate the Georgia Railroad Company, with powers to construct a rail or turnpike road from the City of Augusta, with branches extending to the towns of Eatonton, Madison, in Morgan County, and Athens, to be carried beyond those places, at the discretion of said company, to punish those who may wilfully injure the same, to confer

all corporate powers necessary to effect said object, and to repeal an act entitled, 'An act to authorize the formation of a company for constructing a railroad or turnpike from the City of Augusta to Eatonton, and thence westward to the Chattahoochee River, with branches thereto, and to punish those who may injure the same.' "

The granting of the portion of the sovereignty of the State of Georgia to said corporation, as set out at the end of section XV of said act, is a matter different from what is expressed in the title and by reason of same is repugnant to section XVII, article I of the constitution of 1798 which forbids the General Assembly to enact such acts, to wit: "Nor shall any law or ordinance pass containing any matter different from what is expressed in the title thereof."

[fol. 35] (a) Not merely is it repugnant to the letter of the constitution as set out above, but it is repugnant to the spirit of the constitution of 1798 in that the provision is hidden in the main body of the act at the end of the fifteenth section where the average legislator would not be expecting to find such a provision, and by so being placed and not referred to in the title contravenes the very purpose for which the constitution of 1798 was created, to wit: the prevention of another infamous Yazoo fraud, which had once been enacted by the General Assembly of Georgia, from being inflicted upon the people of Georgia again by means of concealment in the body of the act. The underlying spirit which caused the creation of the constitution of 1798 is as well known to the citizens of Georgia, judges, lawyers, and laymen as is the wording of the constitution itself, and by reason of this this court should recognize this and declare said portion of section XV unconstitutional, null and void, as repugnant to both the letter and the spirit of the constitution.

2. The said portion of section XV is in conflict with section XXII, article I of the constitution of 1798 which reads as follows: "The General Assembly shall have power to make all laws and ordinances which they shall deem necessary and proper for the good of the State which shall not be repugnant to this constitution." This provision of the constitution limits the General Assembly to the passage of those laws which are not repugnant to this constitution, either according to the letter or according to the spirit.

The spirit of the constitution as well as the letter requires that any alienation of the sovereign power of the State is a matter so far different from the creation of a corporation that such grant of sovereignty is void for the reason that it was not expressed in the title.

3. The said portion of section XV is further repugnant to the constitution of 1798 and in conflict with section [fol. 36] XXIII of article I which limits the authority of the General Assembly and declares the rights of the people in the following words: "* * * and this convention composed of the immediate representatives of the people chosen by them to assert their rights, and to revise the powers given by them to the government, and from whose will all ruling authority of right flows, doth assert and declare the boundaries of this State to be as follows * * * (giving the boundaries of Georgia) * * * including and comprehending all the lands and waters within the said limits, boundaries and jurisdictional rights * * *" This exemption provision, set out in section XV of the act of 1833 is especially repugnant to the following portions of said section XXIII of article I of the constitution of 1798: "And this convention doth further declare and assert, that all the territory without the present temporary line and within the limits aforesaid, is now of right the property of the free citizens of the State, and held by them in sovereignty, inalienable but by their consent." This alienation of an essential element of sovereignty is in direct conflict with this provision of the constitution because only the free citizens of Georgia had the power to alienate this portion of the sovereignty of the State.

4. The granting of this portion of the sovereignty of the State of Georgia by the legislature is further prohibited by said section XXIII of said article wherein, after authorizing the legislature to convey to the United States Government the western territory of the State, authorizes the legislature as follows: "* * * and may procure an extension of settlement, and extinguishment of the Indian claims in and to the vacant territory of this State, to the east and north of said river Chattahoochee, to which territory such power of contract or sale by the legislature, shall not extend." This attempted grant of sovereignty to said Georgia Railroad Company was in the territory thus pro- [fol. 37] hibited to the legislature.

5. This portion of section XV of the act of 1833 is further unconstitutional and void because said grant of the portion of the sovereignty of the State of Georgia is a donation or a gratuity in favor of said corporation and its stockholders and was not enacted by a concurrence of two-thirds of the General Assembly and is in conflict with the following portion of section XXIV of article I of the constitution of 1798, which reads as follows: "No vote, resolution, law, or order shall pass the General Assembly, granting a donation or gratuity in favor of any person whatever, but by the concurrence of two-thirds of the General Assembly."

6. This portion of section XV of the act of 1833 is further unconstitutional and void because said grant is in conflict with paragraph I, section I, article IV of the constitution of 1877, which reads as follows: "Taxation, a sovereign right. The right of taxation is a sovereign right—inalienable, indestructible—is the life of the State and rightfully belongs to the people in all Republican Governments, and neither the General Assembly, nor any, nor all other departments of the government established by this constitution, shall ever have the authority to irrevocably give, grant, limit, or restrain this right; and all laws, grants, contracts, and all other acts, whatsoever, by said government, or any department thereof, to effect any of these purposes, shall be, and are hereby declared to be null and void, for every purpose whatsoever; and said right of taxation shall always be under the complete control of, and revocable by, the State, notwithstanding any gift, grant, or contract, whatsoever, by the General Assembly."

7. This portion of section XV of the act of 1833 is further unconstitutional and void because said grant of exemption from taxation conflicts with paragraph III, section III, article I of the constitution of 1877, as amended in 1945, [fol. 38] which reads as follows: "Revocation of tax exemptions. All exceptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void."

Sections XIII and XIV of the act of 1835, which act created the Georgia Railroad and Banking Company, which sections read of follows:

"Section XIII. The act to which this is an amendment, shall be and remain in full force and effect, in

every section and clause thereof, except where it conflicts with the provisions of this act."

"Section XIV. All the acts done and contracts made by the Georgia Railroad Company, are hereby declared to be of binding efficacy on the Georgia Railroad and Banking Company; and all the rights to property acquired by the Georgia Railroad Company, of whatsoever nature or kind the same may be, shall pass to and be vested in the Georgia Railroad and Banking Company as fully and completely as they were vested in the said Georgia Railroad Company."

are the only portions of the act which can possibly be construed as conveying to this company any immunities of the Georgia Railroad Company and these are unconstitutional and void in so far as they attempt to convey to the Georgia Railroad and Banking Company the tax exemption set out in section XV of the act of 1833 creating the Georgia Railroad Company, for each of the same reasons as set out in paragraph 3 and all its sub-paragraphs.

4

The said portion of section XV of the act of 1833 is void for the additional reason that the corporation to which this section applies failed to carry out the purpose for which it was created, to wit, to authorize the corporation to engage in the building of a railroad, and by reason of said failure any grant of exemption from taxation, gratuitous or otherwise, became null and void.

[fol. 39]

5

Appellee shows further that the constitutionality of the act of 1833 or the act of 1835, as complained of in subparagraphs 2, 3, 4, and 5 of paragraph 3 and paragraph 4, has never been determined by the Supreme Court of the State of Georgia. In the case of State of Georgia v. Georgia Railroad and Banking Company, 54 Ga. 424, in the opinion of Judge McCay it appears that the powers of the General Assembly were considered. However, in so far as this case appears to hold that the exemption was constitutional as to the Georgia constitution, it is obiter dicta because no question of the constitutionality of the act as applied to the Georgia constitution had been made an issue before the court by the pleadings or the bill of

exceptions, and the amending act of 1835 was not considered by the court.

Wherefore, appellee prays that said portions of the act be declared unconstitutional and that he have judgment against appellant.

Eugene Cook, Attorney General, Victor Davidson, Assistant Attorney General. Claude Shaw, Assistant Attorney General. Attorneys for Appellee.

[fol. 40] [File endorsement omitted.]

[fol. 41] In the Superior Court of Chatham County.

Atlantic Coast Line Railroad Company, Appellant,

vs.

M. E. Thompson, State Revenue Commissioner, Appellee.

Opinion—Filed January 26, 1946

The above matter submitted to the Court without a jury on an agreed statement of facts, it is adjudged that:

This court is not called upon to say whether or not the legislature in 1833 and 1835 in granting a charter to the Georgia Railroad and Banking Company made a bad bargain. We take it that they acted in the light of that time in a manner that seemed right. In the light of today this Court would not hesitate to state that such a tax limitation as is granted in the charter is bad and that this view is shared by the sovereign people of Georgia is disclosed by the constitutions since that of 1798.

The Court holds that the charter provision (section 15, Acts 1833, p. 256) is legal; that nothing in the constitution of 1798 prevented the legislature from granting such a charter with the tax limitation; and having granted such charter of contract the State of Georgia can not impair it.

It is that the charter appellant can not be taxed "exceeding one half per cent per annum on the net proceeds" and it is so ordered.

R. H. Humphrey, J. S. C. Middle Circuit Presiding.

This January 25, 1946.

[File endorsement omitted.]

[fols. 42-43] IN THE SUPERIOR COURT OF CHATHAM COUNTY

ATLANTIC COAST LINE RAILROAD COMPANY, Appellant,

vs.

M. F. THOMPSON, STATE REVENUE COMMISSIONER, Appellee.

JUDGMENT—February 2, 1946

The State Revenue Commissioner, having on March 5, 1945, assessed Atlantic Coast Line Railroad Company for a deficiency of net income taxes at the rate of 5½% under the act of March 31, 1931, for the years 1941, 1942, and 1943, in respect of the net income accruing to it from the main line of Georgia Railroad and Banking Company from Augusta, Georgia, to Atlanta, Georgia, and from the branch from Union Point, Georgia, to Athens, Georgia, of which railroads Atlantic Coast Line Railroad Company is lessee of a one-half interest therein, and under the charter of Georgia Railroad and Banking Company, the income from said lines of railroad being "subject to a tax not exceeding one-half per cent per annum on the net proceeds of their investments," and it appearing to the Court that a tax of "one-half per cent per annum on the net proceeds of their investments" has been paid and the case having been heard and fully argued, it is thereupon ordered, considered and adjudged in accordance with the opinion of the court rendered January 25, 1946, that the appeal of Atlantic Coast Line Railroad Company is hereby sustained and that the said assessments of taxes are hereby adjudged to be null and void.

This 2 day of February, 1946.

R. H. Humphrey, J. S. C. Middle Circuit, Presiding.

[fol. 44] IN SUPERIOR COURT OF CHATHAM COUNTY

[Title omitted]

MOTION FOR NEW TRIAL.

The above case was heard on November 5, 1945, at the September Term, 1945, of Chatham Superior Court before Honorable R. H. Humphrey, judge superior court of the

Middle Circuit, presiding pro hac vice, the parties by written stipulation at the trial having agreed that all issues of law and fact should be heard and determined by the said judge without the intervention of a jury, and at the conclusion of the evidence and argument on November 8, 1945, the said judge took the case under advisement until the 2nd day of February, 1946, and on said last named date during the December, 1945, term of Chatham superior court said judge made and entered his rulings on the pleadings and evidence, his judgment including findings of fact and of law, and final judgment, which said judgment which included his findings of fact and law was in favor of the appellant, Atlantic Coast Line Railroad Company and against the appellee, M. E. Thompson, State Revenue Commissioner. The appellee (formerly J. Eugene Cook, Commissioner of Revenue of the State of Georgia, now succeeded by M. E. Thompson, Commissioner of Revenue of the State of Georgia) being dissatisfied with the judgment (including findings of fact and of law) rendered against him in said case, comes during the term of court in which said judgment was rendered, before the adjournment thereof, and within thirty days from the rendition of said judgment, and moves the Court for a new trial upon the following grounds, to wit:

[fol. 45]

1

Because the judgment (including findings of fact and of law) is contrary to the evidence and without evidence to support it.

2

Because the judgment (including findings of fact and of law) is decidedly and strongly against the weight of the evidence.

3

Because the judgment (including findings of fact and of law) is contrary to law and the principles of justice and equity.

For special grounds of his motion for new trial, appellee says:

4

During the progress of the trial the appellant, Atlantic Coast Line Railroad Company, amended its appeal and as additional defense filed its plea of res adjudicata as follows:

"5. Appellant, Atlantic Coast Line Railroad Company, pleads as res adjudicata on the provision that section 15 of the charter of Georgia Railroad and Banking Company is an irrevocable and inviolable contract and protected by the clauses of the Federal and State constitutions prohibiting the impairment of contracts,

"(1) The decision in the case of Georgia Railroad and Banking Company v. The State of Georgia, filed in Fulton superior court, which was appealed to the Supreme Court of the United States in the case entitled, 'State of Georgia v. Georgia Railroad and Banking Company,' and reported in 54 Ga. 424."

"(2) The decision in the case of Georgia Railroad and Banking Company v. Wright, filed in the United States District Court for the Northern District of [fol. 46] Georgia, which was reported in 132 Fed. 912, and which was appealed to the Supreme Court of the United States and is reported under the title of 'Wright v. Georgia Railroad and Banking Company,' 216 U. S. 420)"

and on the 2nd day of February, 1946, the court made its finding for the appellant, Atlantic Coast Line Railroad Company, and in finding for the appellant the judgment had the effect of sustaining said plea of res adjudicata and had the effect of a finding of fact that the evidence sustained said plea on each of two grounds specified in said plea.

On said finding of fact movant avers:

(a) That said finding of fact was, and is erroneous and is prejudicial and hurtful to the movant for the reason that it is contrary to the evidence and without evidence to support it.

Movant further avers that said finding of fact is erroneous and is hurtful and prejudicial to movant in the particulars mentioned in this ground because the same is contrary to law and the principles of law and equity in that there was no evidence to support it.

Movant further avers that said finding of fact is erroneous and is hurtful and prejudicial to movant because said erroneous finding of fact was a finding upon which the judgment against the movant was based by the trial court.

(b) Movant further avers that the ruling of law of the court based on the aforesaid finding of fact sustaining said plea of res adjudicata was and is erroneous, contrary to law, injurious, hurtful and prejudicial to movant for the following reasons:

(1) Because same is contrary to the evidence and there was no evidence introduced at said trial to support said finding of law.

(2) Because said ruling of law is not supported by any finding of fact authorized by the evidence upon which such finding of law can be legally based.

[fol. 47] (3) Because said ruling of law was a material and erroneous finding of law which entered into the final finding of fact and the final judgment and upon which the final judgment of the court against movant was based.

5

Because the court erred in the following particular: The Atlantic Coast Line Railroad Company having pleaded an exemption from the taxes assessed in said action by virtue of section XV of the act of 1833, to wit: "The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them: and after that, shall be subject to a tax not exceeding one half per cent per annum on the net proceeds of their investments." which act of 1833 the said appellant alleged created the Georgia Railroad and Banking Company, the said M. E. Thompson, as State Revenue Commissioner, appellee, filed his special plea alleging that the said section XV was unconstitutional under the constitution of 1798, under the constitution of 1877, and under the constitution of 1877 as amended in 1945, in so far as it applied to the granting of an exemption which appellant claimed. A copy of the material portions of which special plea is hereto attached, marked exhibit "A" and made a part of this ground.

The hearing on said special plea was held and considered at the same time as the other questions involved were heard and on the 25th day of January, 1946, the court ruled against the said M. E. Thompson, as State revenue commissioner, on each and every ground of said special plea and

ruled that said section XV of the act of 1833 was constitutional, which ruling included both findings of fact and conclusions of law, the material portion of which ruling being as follows: "The court holds that the charter provision (Section 15 Acts 1833, p. 256) is legal; that nothing in the [fol. 48] constitution of 1798 prevented the legislature from granting such a charter with the tax limitation; and having granted such charter or contract the State of Georgia can not impair it. Under the charter appellant can not be taxed 'exceeding one half per cent per annum on the net proceeds' and it is so ordered."

Movant avers that said ruling was and is erroneous and is prejudicial and hurtful to the movant for the reason that it is contrary to the evidence and without evidence to support it; because it is contrary to law and the principles of law and equity and because said ruling was an erroneous finding of fact and an erroneous conclusion of law which entered into and controlled the final judgment and upon which the final judgment of the court against movant was based; that said section XV of the act of 1833 is unconstitutional for each of the reasons alleged in said special plea; and affiant says that the Court should have found in favor of the appellee, M. E. Thompson, State revenue commissioner of Georgia, on said plea and should have held that section XV of the act of 1833, as set forth in said plea, was unconstitutional for each of the several reasons set forth in said plea.

6

Movant avers that the finding of fact in favor of the plea of res adjudicata was contrary to the evidence in that:

(a) The evidence submitted in support of the plea of res adjudicata was the record in the case of the State v. Georgia Railroad and Banking Company, 54 Ga. 424, and this evidence revealed that the subject matter of said suit involved the collection of ad valorem taxes upon the property of the Georgia Railroad and Banking Company assessed for the year 1874, whereas in the case at bar the subject matter involved is the right of the State to collect income taxes due the State of Georgia for the years 1941, 1942, and 1943, by the Atlantic Coast Line Railroad Company, the lessee [fol. 49] of the Georgia Railroad and Banking Company;

and the subject matter of said respective suit is different; and the parties are not the same.

(b) In support of said plea of res adjudicata the record in the case of Georgia Railroad and Banking Company v. Wright, 132 Fed. 912, and Wright v. Georgia Railroad and Banking Company, 216 U. S. 420 (being the same case) was introduced, and said evidence shows that the suit was brought by the Georgia Railroad and Banking Company against Wright, comptroller general, as an individual, and not in his official capacity; that the State was not a party to said suit; that the subject matter involved in said case was the collection of taxes alleged to be due the State of Georgia for the year 1903; that said evidence shows without dispute that the parties to said suit were not the same as in the case at bar; that the subject matter involved in said suit was not the same as that involved in the case at bar. The case at bar involved the collection of income taxes for the years 1941, 1942, and 1943.

Wherefore, appellee prays the court to grant a rule nisi calling upon the appellant to show cause, if any it has or can, why this motion should not be granted and a new trial awarded as prayed, and also prays that these his grounds for a new trial be inquired of by the court and a new trial be granted.

Eugene Cook, Attorney General. Claude Shaw, Assistant Attorney General. E. J. Clower, Assistant Attorney General. Victor Davidson, Assistant Attorney General. Attorneys for Appellee.

[fol. 50] EXHIBIT "A" TO MOTION FOR NEW TRIAL

3

That portion of section XV of the act of 1833 limiting the tax on the *stock* of the Georgia Railroad Company, to wit, "The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them; and after that, shall be subject to a tax not exceeding one half per cent per

annum on the net proceeds of their investments." in so far as it applies to the claim of exemption of the appellant in this case is null and void and in conflict with the constitution of 1798, which constitution was in force at the time of the passage of said act, and its amendments for each of the following reasons:

1. The caption of said act of 1833 reads as follows: "An act to incorporate the Georgia Railroad Company, with powers to construct a rail or turnpike road from the City of Augusta, with branches extending to the towns of Eatonton, Madison, in Morgan County, and Athens, to be carried beyond those places, at the discretion of said company, to punish those who may wilfully injure the same, to confer all corporate powers necessary to effect said object, and to repeal an act entitled, 'An act to authorize the formation of a company for constructing a railroad or turnpike from the City of Augusta to Eatonton, and thence westward to the Chattahoochee river, with branches thereto, and to punish those who may injure the same.'"

The granting of the portion of the sovereignty of the State of Georgia to said corporation, as set out at the end of section XV of said act, is a matter different from what is expressed in the title and by reason of same is repugnant to section XVII, article 1 of the constitution of 1798 which forbids the General Assembly to enact such acts, to wit: "Nor shall any law or ordinance pass con- [fol. 51] taining any matter different from what is expressed in the title thereof."

(a) Not merely is it repugnant to the letter of the constitution, as set out above, but it is repugnant to the spirit of the constitution of 1798 in that the provision is hidden in the main body of the act at the end of the fifteenth section where the average legislator would not be expecting to find such a provision, and by so being placed and not referred to in the title contravenes the very purpose for which the constitution of 1798 was created, to wit: the prevention of another infamous Yazoo Fraud, which had once been enacted by the General Assembly of Georgia, from being inflicted upon the people of Georgia again by means of concealment in the body of the act. The underlying spirit which caused the creation of the constitution of 1798 is as well known to the

citizens of Georgia, judges, lawyers, and laymen as is the wording of that constitution itself, and by reason of this, this court should recognize this and declare said portion of section XV unconstitutional, null and void, as repugnant to both the letter and the spirit of the constitution.

2. The said portion of section XV is in conflict with section XXII, article 1 of the constitution of 1798 which reads as follows: "The General Assembly shall have power to make all laws and ordinances which they shall deem necessary and proper for the good of the State which shall not be repugnant to this constitution." This provision of the constitution limits the General Assembly to the passage of those laws which are not repugnant to this constitution, either according to the letter or according to the spirit. The spirit of the constitution as well as the letter requires that any alienation of the sovereign power of the State is a matter so far different from the creation of a corporation that such grant of sovereignty is void for the reason that it was not expressed in the title.

[fol. 52] 3. The said portion of section XV is further repugnant to the constitution of 1798 and is in conflict with section XXIII of article I which limits the authority of the General Assembly and declares the rights of the people in the following words: ". . . and this convention composed of the immediate representatives of the people chosen by them to assert their rights, and to revise the powers given by them to the government, and from whose will all ruling authority of right flows, doth assert and declare the boundaries of this State to be as follows: . . . (giving the boundaries of Georgia) . . . including and comprehending all the lands and waters within the said limits, boundaries and jurisdictional rights. . . ."

This exemption provision, set out in section XV of the act of 1833, is especially repugnant to the following portion of said section XXIII of article I of the constitution of 1798: "And this convention doth further declare and assert, that all the territory without the present temporary line and within the limits aforesaid, is now of right the property of the free citizens of the State, and held by them in sovereignty, inalienable but by their con-

sent." This alienation of an essential element of sovereignty is in direct conflict with this provision of the constitution because only the free citizens of Georgia had the power to alienate this portion of the sovereignty of the State.

4. The granting of this portion of the sovereignty of the State of Georgia by the legislature is further prohibited by said section XXIII of said article wherein, after authorizing the legislature to convey to the United States Government the western territory of the State, authorized the legislature as follows: ". . . and may procure an extension of settlement, and an extinguishment of Indian claims in and to the vacant territory of this State, to the east and north of the said River Chattahoochee, to which territory such power of contract or sale by the [fol. 53] legislature, shall not extend." This attempted grant of sovereignty to said Georgia Railroad Company was in the territory thus prohibited to the legislature.

5. This portion of section XV of the act of 1833 is further unconstitutional and void because said grant of the portion of the sovereignty of the State of Georgia is a donation or a gratuity in favor of said corporation and its stockholders and was not enacted by a concurrence of two-thirds of the General Assembly and is in conflict with the following portion of section XXIV of article I of the constitution of 1798, which reads as follows: "No vote, resolution, law, or order shall pass the General Assembly, granting a donation or gratuity in favor of any person whatever, but by the concurrence of two-thirds of the General Assembly."

6. This portion of section XV of the act of 1833 is further unconstitutional and void because said grant is in conflict with paragraph I, section I, article IV of the constitution of 1877, which reads as follows: "Taxation, a sovereign right. The right of taxation is a sovereign right—inalienable, indestructible—is the life of the State, and rightfully belongs to the people in all Republican governments, and neither the General Assembly, nor any, nor all other departments of the Government established by this constitution, shall ever have the authority to irrevocably give, grant, limit, or restrain this right; and all

laws, grants, contracts, and all other acts, whatsoever, by said government, or any department thereof, to effect any of these purposes, shall be, and are hereby declared to be null and void, for every purpose whatsoever; and said right of taxation shall always be under the complete control of, and revocable by, the State, notwithstanding any gift, grant, or contract, whatsoever, by the General Assembly."

7. This portion of section XV of the act of 1833 is further unconstitutional and void because said grant of exemption from taxation conflicts with paragraph III, sec-
[fol. 54] tion III, article I of the constitution of 1877, as amended in 1945, which reads as follows: "Revocation of tax exemptions. All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void."

Due and legal service of the within motion for new trial acknowledged. Time, copy, and all other service waived and we, as counsel for defendant in error, consent for a hearing to be had on said motion by the Honorable R. H. Humphrey, Judge pro hac vice at Swainsboro, Ga., on the 21st day of February, 1946.

This 21st day of February, 1946.

Carl H. Davis, Philip H. Alston, T. M. Cunningham, Attorneys for Respondent, Atlantic Coast Line Railroad Company.

[fol. 55] IN SUPERIOR COURT OF CHATHAM COUNTY

ORDER DENYING MOTION FOR NEW TRIAL—Feb. 21, 1946

The foregoing motion for new trial read and considered. The recital of facts contained in the motion for new trial is hereby approved as true and correct and all of the grounds of the motion are approved and allowed, except grounds numbers 4 and 6. The court did not consider the plea of res adjudicata described therein and this did not enter into the final judgment.

Counsel for both parties being present and having consented to a hearing on said motion at this time, and the grounds of said motion having been considered, it is

hereby ordered that the motion for new trial be *denied*. Let the said motion and this order be filed as a part of the record in said case.

This 21st day of February, 1946.

R. H. Humphrey, Judge Pro Hac Vice, Superior Court Chatham County.

[fol. 56] In Superior Court of Chatham County

Statement of Evidence

Evidence Introduced by Appellant Atlantic Coast Line Railroad Company.

Oral Evidence.

H. E. Judge, a witness for appellant, swore on direct examination: My name is H. E. Judge. I am a resident of Fulton County and am employed by the Georgia Railroad lessee organization and the Atlanta & West Point and Western Railway of Alabama as auditor. I have been employed for five years as auditor. For several years before that I was general bookkeeper for all three railroads, and prior to that general and special accountant for Atlanta & West Point and Western Railway of Alabama. The lines of railroad that make up the System known as the Georgia Railroad are the main line from Augusta to Atlanta, the branch line from Union Point to Athens, which are generally referred to as the charter lines under the original charter of 1833 and the amendments thereto. Other lines in the Georgia Railroad system are: The Washington branch running from Barrett to Washington and the Macon branch from Warrenton to Macon. That branch really runs from Camak to Macon, but under the charter, as I understand it, the section of it from Camak to Warrentown, about three miles, is included in the original charter of the main line. The main line has three branches all told, the Macon and Augusta Railroad purchased by the Georgia Railroad later does not come under this charter. I am familiar with the taxation of these various properties, both the so-called charter lines and the non-charter lines. The non-charter lines are taxed as other corporations. I have had to do with the

making up and preparing of tax returns for the State of Georgia for the charter lines. There has been introduced in evidence a photostatic copy of the return for the year 1942 for the Georgia Railroad and Banking Company of one half of one per cent on its net income. I inspected [fol. 57] that photostat. I saw the original from which the photostat was made which was made in my office and after it was made in my office was sent to the Georgia Railroad and Banking Company to be executed by them and filed with the State. The president of the Georgia Railroad and Banking Company is Mr. C. F. Phinizy, Augusta. In applying section XV of the charter in making up the returns on the charter lines from Atlanta to Augusta and the Athens branch, we take all the earnings and expenses of the main lines and the Athens branch, not including, of course, any part paid by the lessees to the lessors as rental for that property. We include the net earnings of those two sections of the lines before rentals and do not deduct any part of the rentals. If there were four million net revenue, that would be the net revenue before the rentals were taken out and the tax would be paid on the net shown by that. Using arbitrarily the figure four million it would be applied on the four million. These returns have been made each year in that manner during my time with the Railroad and have been sent to the Banking Company, and I understand have been filed and received by the State. The Banking Company pays the taxes directly to the State. Until this deficiency assessment was made some time back no demand had been made for income tax by the State of Georgia on the lessee companies for the net income of the main line and Athens branch since the State income tax act was passed in 1931. This is the first demand that was made. The Georgia Railroad and Banking Company pays on its non-charter lines ad valorem taxes just as any other company does and has intangibles on which it pays. It returns its intangibles to the State of Georgia on the intangibles tax act. That doesn't figure in these returns at all. I am in possession of all historical records of these tax matters extending back a good many years. It has always been paid on this same basis as shown by the returns for the year 1942 as far back—I have records as far back as twenty-eight years at least.

[fol. 58] Cross-examination.

I represent the Atlantic Coast Line Railroad Company only in so far as they are joint lessees of the Georgia Railroad and Banking Company. The Atlantic Coast Line and the L. & N. are joint lessees of the Georgia Railroad and Banking Company properties which are operated as a separate organization known as the Georgia Railroad Lessee Organization. This organization is not incorporated. I am employed by it but I am not actually employed by the Atlantic Coast Line. I do not know when the Atlantic Coast Line Railroad Company was incorporated or the Atlantic Coast Line Railroad Company of South Carolina, and I am not familiar with the records of that corporation.

[fol. 59] In the Superior Court of Chatham County.

[Title omitted]

Agreed Statement of Facts.

1. Georgia Railroad & Banking Company is a corporation created by and existing under the laws of the State of Georgia. The appellant contends it was incorporated under the act of the General Assembly of the State of Georgia approved December 21, 1833, (Acts 1833, p. 256), and several acts amendatory thereof, and that its name was originally Georgia Railroad Company, and was changed to its present name by act of the General Assembly of the State of Georgia approved December 18, 1835, (Acts 1835, p. 180). Appellee contends that the act of 1835 repealed certain portions of the act of 1833 and created an entirely new corporation. Appellant contends that the material portions of the act of December 21, 1833, to this controversy are section 15, which contains the tax limitations, the application of which is in controversy here, and sections 12 and 14, which relate to the power of the company to lease its property and branches. Section 15. "The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any of them; and after that shall be subject to a tax not exceeding one-half per cent per annum on the net proceeds of their investments."

2. Section 12 of said act of December 21, 1833, (Acts 1833, p. 262) provides: "The said Georgia Railroad Company shall, at all times, have the exclusive right of transportation or conveyance of persons, merchandise, and [fol. 60] produce, over the railroad and railroads by them to be constructed, while they see fit to exercise the exclusive right; Provided, that the charge of transportation or conveyance shall not exceed forty cents per hundred pounds on heavy articles, and ten cents per cubic foot, on articles of measurement, for every one hundred miles; and five cents per mile for every passenger; Provided, always, that the said company may, when they see fit, rent or farm out all or any part of their exclusive right of transportation or conveyance of persons, on the railroad or railroads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon, subject to the rates above mentioned. And the said company, in the exercise of their right of carriage or transportation of persons or property, or the persons so taking from the company the right of transportation or conveyance, shall, so far as they act on the same, be regarded as common carriers. . . ."

Section 14 of said act of December 21, 1833 (Acts 1833, p. 263) provides: "Whenever the company aforesaid shall see fit to farm out as aforesaid, to any person, or persons, or body corporate, any part of their exclusive right of conveyance and transportation, or shall deem it expedient to open the said road or any part thereof, to public use, they shall and may adopt and enforce all necessary rules and regulations, and have power to prescribe the construction and size or burthen of all carriages and vehicles, and the material of which such shall be made, that shall be permitted to be used or pass on the said railroad, and the locomotive power that shall be used with them."

3. The tax limitations contained in section 15 (quoted above) of the acts of December 21, 1833, if valid and applicable to this case, applies to the main line of Georgia Railroad and Banking Company from Augusta, Georgia, to Atlanta, Georgia, 171 miles, and to the branch line from Union Point, Georgia, to Athens, Georgia, 39 miles.

[fol. 61] 4. May 7, 1881, Georgia Railroad and Banking Company leased to William M. Wadley, and his assigns, for the term of 99 years from April 1, 1881, for an annual rental of $600,000. "All its privileges, general and exclusive, of transporting persons, merchandise, produce and every kind of property whatsoever, which is or may become the subject of railroad transportation, over the lines of railroad owned or controlled by the party of the first part, to the full extent that the party of the first part has and enjoys, or is now entitled to have and enjoy, or may hereafter acquire the right to have and enjoy such privileges, and subject to all the obligations and duties, imposed by the charter in this behalf upon the party of the first part," and also its railroad from Augusta to Atlanta and its branches and all extensions thereof which might be thereafter made, and its interest in certain stocks and bonds of other railroad companies. The lease did not cover the banking house, banking privileges, and banking business of the lessor, or lands, houses and tenements belonging to the lessor not necessary or used for railroad purposes. The lessee agreed to deposit $1,000,000 in bonds of the United States or in other bonds of equal value, as security for the lease.

A copy of the said lease of May 7, 1881, marked Exhibit 1, is hereto attached and hereby made a part of this agreed statement of facts, and shall be considered in evidence in lieu of the original.

5. May 17, 1881, William M. Wadley assigned to Louisville and Nashville Railroad Company a ½ interest in said Georgia Railroad lease of May 7, 1881, a copy thereof being hereto attached, marked Exhibit 2, and hereby made a part of this agreed statement of facts, and shall be considered in evidence in lieu of the original.

June 1, 1881, William M. Wadley assigned the other ½ of his interest in said Georgia Railroad lease of May [fol. 62] 7, 1881, to Central Railroad and Banking Company of Georgia, a copy thereof being attached hereto, marked exhibit 3 and hereby made a part of this agreed statement of facts, and shall be considered in evidence in lieu of the original.

The ½ interest of Central Railroad & Banking Company of Georgia in the Georgia Railroad lease of May 7, 1881, was sold under decree of the U. S. District Court

for the Eastern Division, of the Southern District of Georgia, in the receivership proceedings under which the properties of Central Railroad & Banking Company of Georgia were liquidated, and was purchased by The Mercantile Trust Company for account of Samuel Thomas and Thomas F. Ryan, which sale was duly reported to and confirmed by the said court on October 17, 1895; thereafter on February 3, 1897, The Mercantile Trust Company sold and assigned to Samuel Thomas and Thomas F. Ryan, their heirs and assigns, said undivided ½ interest so purchased by it as aforesaid in the said lease of Georgia Railroad and Banking Company to William M. Wadley, dated May 7, 1881, and to all the covenants contained in said indenture, the leasehold estate, etc., a copy thereof being attached hereto, marked Exhibit 4, and hereby made a part of this agreed statement of facts, and shall be considered in evidence in lieu of the original, and thereafter Central of Georgia Railway Company, on Feby. 28, 1898, quit-claimed to the Louisville & Nashville Railroad Company all the right, title, interest, claim or demand which it may have or be entitled to have in and to the half interest which was heretofore held and enjoyed by Central Railroad & Banking Company of Georgia, in said lease. A copy of said acquittance is hereto attached, marked Exhibit 5 and hereby made a part of this agreed statement of facts, and shall be considered in evidence in lieu of the original. Said ½ interest in said Georgia Railroad lease was assigned by said Samuel Thomas and Thomas F. Ryan on Feby. 2, [fol. 63] 1898, to Louisville & Nashville Railroad Company, a copy thereof being hereto attached marked Exhibit 6, and hereby made a part of this agreed statement of facts, and shall be considered in evidence in lieu of the original.

Louisville & Nashville Railroad Company assigned a ½ interest in the said Georgia Railroad lease of May 7, 1881, to Atlantic Coast Line Railroad Company of South Carolina, a copy of said assignment being hereto attached, marked Exhibit 7, and hereby made a part of this agreed statement of facts, and shall be considered in evidence in lieu of the original.

Atlantic Coast Line Railroad Company of Virginia,—by change of name, Atlantic Coast Line Railroad Company—appellant, succeeded to the rights of the Atlantic

Coast Line Railroad Company of South Carolina in the said ½ interest of the said Georgia Railroad lease of May 7, 1881, by joint agreement of consolidation entered into the 18th day of April, 1900, between the said two railroads and other railroad companies therein named. Excerpts from said agreement are hereto attached, marked exhibit 8, and hereby made a part of this agreed statement of facts, and shall be considered in evidence in lieu of the original.

6. The railroads and their appurtenances of Georgia Railroad and Banking Company, of which the Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company are now lessees, are managed and operated by a General Manager appointed by the chief executive officer of each of said lessees, and separate accounts are kept of its operations.

7. The deficiency tax claimed in this suit is assessed under the provisions of the income tax act of the General Assembly of the State of Georgia approved March 31, 1931, and the amendments thereof, one of the provisions of which is contained in the Code of Georgia Annotated, § 92-3102, which provides: "Every domestic corporation and every foreign corporation shall pay an-
[fol. 64] nually an income tax equivalent to five and one-half per cent of the net income from property owned or from business done in Georgia, as is defined in section 92-3113."

8. The tax deficiency claimed by the department of revenue is for net income taxes for the years 1941, 1942, and 1943, and the amount of taxes assessed as of March 5, 1945, for said deficiency is as follows:

For the year 1941—Principal	$35,465.46		
Interest	6,383.78		
			$41,849.24
For the year 1942—Principal	$89,766.14		
Interest	10,411.94		
			$97,178.08
For the year 1943—Principal	$57,040.20		
Interest	3,422.41		
			60,462.61
			$199,489.93

besides interest from March 5, 1945, at the rate of 1% per month from March 5, 1945, until paid.

The redetermination of this tax was arrived at by the Revenue Commissioner by treating the Georgia Railroad and all of its branches as a unit, or system, and no effect was given by him to the charter, nor was any credit given for the one-half of 1% tax paid by the Georgia Railroad and Banking Company.

The deficiency claimed is with respect to the net income received by Atlantic Coast Line Railroad Company under its lease of a one-half interest in the Georgia Railroad from the main line which runs from Augusta to Atlanta and from the branch from Union Point to Athens, which net income Atlantic Coast Line Railroad Company claims is not lawfully taxable to it, because Georgia Railroad and Banking Company has returned and paid to the State of Georgia taxes on its net income from said main line and Athens branch at the rate of one-half of 1% per annum, as provided by section 15 of the charter of Georgia Railroad and Banking Company (quoted above); and Atlantic [fol. 65] Railroad Company claims that the net income received by it from said source cannot be taxed to it without impairing the obligation of the contract between the State and Georgia Railroad and Banking Company contained in the sections of the charter of the latter, quoted above, contrary to article 1, section 10, par. 1 (Code, §1-134) of the constitution of the United States, and article I, section III, par. II of the constitution of the State of Georgia.

There is no dispute as to the figures stated if said net income is lawfully taxable to Atlantic Coast Line Railroad Company, otherwise no taxes are due on said claim for deficiencies.

9. Atlantic Coast Line Railroad Company appealed from said tax assessments to the superior court of Chatham County, Georgia, under the provisions of section 92-8446 of the Code of Georgia annotated, and reference is made to the papers filed by the department of revenue, in its return to said appeal, for the contentions of the parties.

10. Georgia Railroad and Banking Company has always and for more than 100 years made its tax returns and paid taxes under the 15th section of said act of December 21, 1833.

11. Although the income tax act of the State of Georgia of March 31, 1931, has been in effect since January 1, 1931, the State of Georgia has never before this assessment demanded that the lessees of the Georgia Railroad should return under said act the net income received by them from the operations of the main line and the Athens branch of the Georgia Railroad, and the lessees have never made any such return or paid any such tax to the State of Georgia.

12. Similar assessments have been made by the revenue department of the State of Georgia against Louisville and Nashville Railroad Company in respect of the net income received by it from the main line and Athens branch of the Georgia Railroad, as lessee of the other half interest in the Georgia Railroad lease; and Louisville and Nashville [fol. 66] Railroad Company has appealed from said assessments to the superior court of Fulton County, Georgia.

13. Either party may introduce admissible evidence either supplemental or additional hereto.

[fol. 67] EXHIBIT NO. 1 TO AGREED STATEMENT OF FACTS

LEASE

The Georgia Railroad & Banking Company

to

William M. Wadley.

Georgia:

This indenture, made this seventh day of May, Anno Domini, One Thousand Eight Hundred and Eighty-One, between The Georgia Railroad and Banking Company, a corporation under the laws of said State, party of the first part, and Wm. M. Wadley, of Monroe County, in said State party of the second part, witnesseth: That the party of the first part, in conformity with the provisions of its charter, and acting in this behalf in pursuance of a resolution of its board of directors, regularly convened on the twelfth day of April in the year One Thousand Eight

Hundred and Eighty-One for and in consideration of the covenants, conditions and agreements hereinafter set forth on the part of said party of the second part,

Hath rented and farmed out to said party of the second part and his assigns, and does by these presents rent and farm out to said party of the second part and his assigns for the full term of ninety-nine years from the first day of April, One Thousand Eight Hundred and Eighty-one.

All its privileges, general and exclusive, of transporting persons, merchandise, produce and every kind of property whatsoever, which is or may become the subject of railroad transportation, over the lines of railroad owned or controlled by the party of the first part, to the full extent that the party of the first part has and enjoys, or is now entitled to have and enjoy, or may hereafter acquire the right to have and enjoy such privileges, and subject to all [fol. 68] the obligations and duties, imposed by its charter in this behalf upon the party of the first part.

And the party of the first part has also rented and farmed out, and does by these presents rent and farm out to the party of the second part for the aforesaid term of ninety-nine years, as the means of full enjoyment of the privileges hereinbefore rented and farmed out, the following property, to wit:

The Georgia Railroad from Augusta to Atlanta, and its branches, viz: The branch from Barnett to Washington; the branch from Camak to Warrenton, and the branch from Union Point to Athens, with all the extensions thereof which may be made hereafter to other points:

Also, the Macon and Augusta Railroad, from Warrenton to Macon:

Together with the rights of way, road-beds, depots, stations, warehouses, elevators, work shops, wells, cisterns, water tanks, and other appurtenances of said railroad and branches.

And the party of the first part also hereby assigns to the party of the second part, so far as it can lawfully do so, any right it may have to extend any of said railroads or branches.

And the party of the first part also assigns to the party of the second part and his assigns, all its right, claim, interest and demand, in, to and upon the Walton railroad, so that the party of the second part may have the same

right touching the bonds of the Walton Railroad Company, that he has by virtue of these presents in reference to the bonds of the Augusta and Port Royal Railway, as hereinafter provided.

"And the party of the first part also assigns by these presents to the party of the second part and his assigns, all the right of ownership, management, control and use [fol. 69] of the Western Railroad of Alabama, which the party of the first part now has or is entitled to; Provided, that when either branch of the Western Railroad of Alabama from Opelika into Georgia shall be sold, one-half of the proceeds of the sales shall be received by the party of the first part."

But in consideration that the party of the second part and his assigns will thereby lose the free use of the property of the part of the first part in the branch so sold, the party of the first part will in that event pay to the party of the second part and his assigns interest on said half of the proceeds at the same rate that the then bonds of the Western Railroad of Alabama, or its successor, may bear at the date of payment of the interest of said bonds. That is to say, if said bonds shall bear eight per cent interest, that rate of interest shall be paid on one-half of the proceeds, and if said bonds bear six per cent interest, then that rate of interest shall be paid on one-half the proceeds, and so from time to time.

The party of the first part also agrees to assign and transfer to the party of the second part and his assigns, for and during said term of ninety-nine years, the income of the stock now held by the party of the first part in the Atlanta and West Point Railroad Company, to wit: Four thousand four hund l and nine shares; and in the Rome Railroad Company, to wit: Fourteen hundred and eighty-nine shares and three-eighths of a share.

Also to give to the party of the second part and his assigns an irrevocable power of attorney to vote said stocks, with the restrictions hereinafter indicated, as fully as the party of the first part might vote them if this agreement had not been made:

Also, to assign and transfer to the said party of the second part and his assigns, for and during said term of ninety-nine years, the income of the stock and of the bonds held by the party of the first part in the Port Royal and

[fol. 70] Augusta Railway Company, and to give the party of the second part and his assigns an irrevocable power of attorney to vote said stocks and bonds, with the restriction hereinafter indicated, as fully as the party of the first part could vote them if this agreement had not been made.

But this provision is not to include the claim of the party of the first part on the Compress Company of Port Royal, its compress, elevator and other property of said compress company.

And if the said bonds of the Port Royal and Augusta Railway Company should be collected at any time by the party of the first part, then the party of the first part will pay to the party of the second part and his assigns interest on said collection for and during the unexpired period of said term of ninety-nine years, at the then current legal rate of interest of the State of Georgia, not exceeding six per cent per annum.

The party of the first part also agrees to deliver to the party of the second part and his assigns all steel rails which have been contracted for by the party of the first part, at the expense of the party of the first part.

The party of the first part also agrees to pay the principal and interest of the bonds of the party of the first part, and of the Macon & Augusta Railroad Company; Provided, that nothing herein contained shall be construed as impairing or in any way affecting the right of the party of the first part to renew any of said bonds.

And the party of the first part also agrees to pay the taxes, which may be payable under the charter of the party of the first part, on the rental hereinafter stipulated, or on so much thereof as may be taxable, and all taxes, if any, which may become by law collectible from the party of the first part on the shares of its stock in the hands of its shareholders. But all other taxes, which may be [fol. 71] payable on the property and franchises, which or the control, use or enjoyment of which, is hereby rented, farmed out, assigned or transferred to the party of the second part and his assigns, shall be paid by the party of the second part and his assigns.

This indenture is not to affect the ownership, use and enjoyment of the party of the first part, as to all the cash, notes, claims, demands, rights and credits, owned by the

party of the first part on the first day of April, Eighteen Hundred and Eighty-One.

The Banking House, banking privileges, and banking business of the party of the first part are no wise affected by this indenture.

The lands, houses and tenements belonging to the party of the first part, other than its elevator and appurtenances in the City of Augusta, not necessary or used for railroad purposes, are not affected by this indenture, and contracts relating to such houses, lands, and tenements, made before the date of these presents, although not yet executed shall not be affected by this agreement, but may be carried out by the party of the first part.

"All contracts now existing between the party of the first part and other railroad companies, except as otherwise and hereinbefore provided, shall be carried out by the party of the second party and his assigns: Provided, that the party of the second part and his assigns shall have the same right to modify, change, or abrogate said contracts, which the party of the first part now has."

In consideration of the things hereinbefore agreed to be done by the party of the first part, the party of the second part hereby covenants for himself and his assigns to pay to the party of the first part the sum of Six Hundred Thousand Dollars annually, for the full term of ninety-nine years, in two semi-annual payments of Three Hundred Thousand Dollars each, the first of said semi-annual pay- [fol. 72] ments to be made on the first day of October, Eighteen Hundred and Eighty-one, and the others on the first days of April and October thereafter, and said payments to be made in such money as is legal tender of the United States at the times of such payment.

The party of the second part also covenants for himself and his assigns to return the property hereinbefore rented, farmed out and assigned to the party of the second part in as good condition as it is now in, and unimpaired in value, that is to say, the railroads and their appurtenances as well adapted to the business of transportation as they now are, and the personal property in personal property equal in value and as well adapted to its uses as it now is. And all the property substituted for and added to that which is hereby rented and farmed out, shall be the property of the party of the first part, to the same extent as the original

property, for which it may be substituted, or to which it may be added, was the property of the party of the first part.

And the party of the second part also covenants for himself and his assigns, to keep the railroads and their appurtenances and the means of transportation in first class condition of such property, and also to indemnify the party of the first part against any damages, losses or liabilities, which may be incurred by reason of the operating of the railroads, the use and control of which are hereby granted and farmed out.

"The party of the second part also covenants for himself and his assigns that he and they will pay the interest demandable of the party of the first part on the bonded debt of the Western Railroad of Alabama, so that said indebtedness shall never be increased; and at the termination for any cause of this agreement, to return the property, which the party of the first part has in said railroad, without any (fol. 73) greater encumbrance thereof than it now bears.

But the party of the first part will consent to the organization of the owners of the Western Railroad of Alabama into a corporation, and to the issue by said corporation of bonds to renew bonds maturing from time to time, for which the said railroad of Alabama is liable, which said bonds the party of the first part hereby agrees to endorse or guarantee to the same extent that it is now bound for the bonds of the Western Railroad of Alabama; Provided, that said incorporation shall not impair the beneficial ownership of said railroad by the party of the first part and

Provided, further, that the aggregate amount of bonded indebtedness of said railroad and the rate of interest thereon shall not be increased to an amount and rate exceeding the present amount of bonds and present rate of interest."

The party of the second part also covenants for himself and his assigns, that the privileges of free passage to the stockholders and directors of the Georgia Railroad and Banking Company shall be continued to the same extent as they are now enjoyed by stockholders and directors respectively, according to the present usages of said company.

The party of the second part also covenants for himself and his assigns that he and they shall have no power to encumber, or to assist in encumbering, or to permit to be

encumbered the property or stocks passing into the control of the party of the second part by virtue of this indenture to the full extent that the said party has control, except the Western Railroad of Alabama, as hereinbefore provided, and that he and they will not for such purpose vote any of the stocks or bonds of the corporations the power of voting which is hereinbefore given, and that the irrevocable powers of attorney hereinbefore stipulated to be given may be restricted on their face in this respect.

The party of the second part also covenants for [fol. 74] himself and his assigns that the party of the first part shall have the right to enter upon and inspect the railroads hereinbefore mentioned, and appurtenances, including the rolling stock used on the same, by persons selected by the party of the first part, as often as the party of the first part may think proper.

The party of the first part reserves the right, in addition to all other remedies now usual or hereafter to become usual in the law, to enter upon and resume possession and enjoyment of all its property for the breach of any of the covenants or agreements of this indenture.

"At the termination for any cause of this lease, all necessary and proper betterments which shall have been made by the party of the second part or his assigns, shall be paid for at their then fair value by the party of the first part."

Provided always, that nothing herein contained shall be construed as giving or attempting to give to the party of the second part or his assigns the right to do or omit any act or thing, the doing or omission of which would furnish a ground for forfeiture of the charter of the party of the first part, and all such acts and omissions are hereby declared to be contrary to the terms and spirit of this indenture, and void.

In order to guarantee the performance of the agreements and covenants hereinbefore made by the party of the second part, said party of the second part further convenants for himself and his assigns to deposit in such place and in such manner as the President of the party of the first part may designate, One Million Dollars in bonds of the United States or in other bonds of equal value—said deposit to be kept up to the clear market value of one million dollars; Provided, the party of the second part and his assigns shall have the privilege of collecting for

his or their benefit the income of said bonds and of chang-
[fol. 75] ing the kind of bonds from time to time, and of substituting for bonds other and different security; Provided, such other and different security be first approved by the party of the first part.

And the party of the second part also covenants for himself and his assigns that his and their legal rights and privileges under this indenture shall be so preserved by him that the deposit of One Million Dollars of security for the due and faithful performance of the terms and conditions of this indenture shall remain and continue so subject during the entire term of the lease without impediment or embarrassment growing out of distribution, or want of representation of the estate of the party of the second part or of any of his assigns; and that it is the true intent and meaning of these presents that said deposit of security shall at all times remain as a guaranty for the covenants of this indenture, and liable to any proceedings at law or in equity to enforce the rights of the party of the first part without let, hindrance or delay on account of the death of the party of the second part, or any of his assigns, testate or intestate, and that death of the party of the second part or any of his assigns, testate or intestate, and the failure of legal representation of his or their estate for any period whatsoever, shall be no excuse for the non-performance of any of the covenants or agreements of the party of the second part.

It is agreed that within sixty days from the date of these presents, a full and complete inventory of all the property delivered under this agreement, showing its character, condition, and value, shall be made by two disinterested experts and annexed to this indenture, as a part thereof—said inventory to be made at the joint expense of the parties of the first and second parts.

In witness whereof, the party of the first part has caused its President to sign these presents and its corporate seal to be affixed hereunto, and the party of the
[fol. 76] second part has hereunto set his hand and seal the day and year first above written.

The Georgia R. R. & Banking Co., By C. H. Phinizy, Pres't. Wm. M. Wadley (L. S.)

In Duplicate.
(Corporate Seal.)

Signed, sealed and delivered in the presence of: A. R. Lawton, Jos. B. Cumming, Henry C. Goodrich, Notary Public, Richmond Co., Ga.

Georgia, Richmond County.

Recorded in Clerk's office, Superior Court of said county. Book K K K, Folios 711, 712, 713, 714, 715, and 716, May 26, 1881.

Wm. E. Keener, Deputy Clerk, Superior Court, R. C. Ga.

[fol. 77] IN THE SUPERIOR COURT OF

CHATHAM COUNTY

[Title omitted.]

AFFIDAVIT OF F. B. POPE

Before the undersigned officer of Richmond County, Georgia, duly authorized to administer oaths, personally appeared F. B. Pope, who, being duly sworn, deposes and says that he is cashier of Georgia Railroad & Banking Company and, as such, has the custody and control of the records of said company; that among said records is a printed copy of a report made May 1, 1846, by J. Edgar Thomson, Ch'f Eng. & Gen'l. Ag't. of said company, to Jno. P. King, President of said company, which contains the following:

"I have the gratification to report to the Board that the several lines of Road which the company have contemplated building are now in successful operation, embracing altogether 213 miles of railway, of which there are 171 miles upon the main line between Augusta and Atlanta.

That portion of the Road, unfinished at the date of my last annual report, was opened for use early in September."

Deponent makes this affidavit for use upon the hearing of any issue in the above-entitled cause.

F. B. Pope

Sworn to and subscribed before me this 2nd day of November, 1945: Helen S. Hutto, Notary Public, Richmond County, Georgia. Notary Public, Richmond County, Ga. My commission expires July 28, 1948. [Seal]

[fol. 78] IN THE SUPERIOR COURT OF
CHATHAM COUNTY
[Title omitted.]

AFFIDAVIT OF F. B. POPE

Before the undersigned officer of Richmond County, Georgia, duly authorized to administer oaths, personally appeared F. B. Pope, who, being duly sworn, deposes and says that he is cashier of Georgia Railroad & Banking Company and, as such, has the custody and control of the records of said company; that among said records is a printed copy of a report made May 10, 1839, by J. Edgar Thomson, said Company's Engineer and Agent, to William Dearing, said Company's President, which contains the following:

"The Union Road has been finished for some months, and the transportation conducted upon it, as high as Jefferson Hall (74 miles) since the 1st of November. . . . The road is now laid to within 200 yards of the depot at Greensboro, and will be continued towards Madison as soon as the iron arrives from England."

Deponent makes this affidavit for use upon the hearing of any issue in the above-entitled cause.

F. B. Pope

Sworn to and subscribed before me this 2nd day of November, 1945: Helen S. Hutto, Notary Public, Richmond County, Georgia. Notary Public, Richmond County, Ga. My commission expires July 28, 1948. [Seal]

[fol. 79] IN THE SUPERIOR COURT OF
CHATHAM COUNTY
[Title omitted.]

AFFIDAVIT OF F. B. POPE

Before the undersigned officer of Richmond County, Georgia, duly authorized to administer oaths, personally appeared F. B. Pope, who, being duly sworn, deposes and says that he is cashier of Georgia Railroad & Banking

Company, and, as such, has the custody and control of the records of said Company; that among said records is a printed copy of a report made April 19, 1841, by J. Edgar Thomson, said Company's Chief Engineer and General Agent, to William Dearing, said Company's President, which contains the following:

"The road is now in operation to Madison, a distance of 104 miles from Augusta."

Deponent makes this affidavit for use upon the hearing of any issue in the above-entitled cause.

F. B. Pope

Sworn to and subscribed before me this 2nd day of November, 1945: Helen S. Hutto, Notary Public, Richmond County, Georgia. Notary Public, Richmond County, Ga. My commission expires July 28, 1948. [Seal]

[fol. 80] STATEMENT OF PROPOSED ADJUSTMENTS

Department of Revenue, State of Georgia
M. E. Thompson, Commissioner

Atlanta, August 30, 1945.

In your reply refer to ITA:REC:DM

AUGUSTA AND SAVANNAH RAILROAD,
411 Liberty Bank and Trust Bldg.,
Savannah, Georgia.

ITA—11655

Dear Sirs:

There is attached a statement of adjustments which this office proposes to make in your income tax liability for the years in question as follows:

Year	Additional Tax	Penalty	Interest	Total
1942	2,624.84	-0-	406.85	3,031.69
1943	2,544.43	-0-	241.72	2,786.15
Totals	5,169.27	-0-	648.57	$5,817.84

If the adjustments are satisfactory you should immediately notify this office of your acceptance by signing

and returning Form A-30 enclosed herewith, and mail remittance immediately.

If you do not agree with the conclusions set forth in the enclosed report, you have a right to file a petition for redetermination of said proposed tax liablity within thirty days from the date of this notice. The protest should set forth all the reasons of law and facts, executed in duplicate, under oath, and should contain the following information:

(a) The name and address of the taxpayer.

(b) The file number shown above.

(c) The year or years involved.

(d) An itemized schedule of the findings to which the taxpayer takes exception.

[fol. 81] (e) A summary statement of the grounds upon which the taxpayer relies in connection with each exception.

(f) In case the taxpayer desires a hearing, a statement to that effect, and if you are represented by an attorney or accountant, power of attorney must be presented.

If no protest is filed within the thirty-day period, the adjustments will be made as indicated and the additional tax and interest will be assessed.

Respectfully, Department of Revenue, By: R. E. Collings, Jr., Agent in charge, Income Tax Unit.

Registered Mail.

[fol. 82]

Copy

Augusta and Savannah Railroad
411 Liberty Bank and Trust Bldg.,
Savannah, Georgia

Schedule No. 1

Net Income and Computation of Tax

Calendar Years	1942	1943
Net income per returns	47,724.37	46,262.34
Tax at 5½%	2,624.84	2,544.43
Less: Tax previously paid	-0-	-0-
Additional Tax	2,624.84	2,544.43
Interest at 6% to October 15, 1945	406.85	241.72
Deficiency to October 15, 1945	3,031.69	2,786.15

Schedule No. 1-A

Explanation of Items Changed Sch. No. 1

Taxpayer reported net income, as shown above, on returns filed with the State of Georgia, but contends that said net income is not subject to Georgia income tax, but is exempt by the terms of its charter from the payment of income tax to Georgia.

Taxpayer is the owner and lessor of railroad properties located with the State of Georgia, which properties are leased to Central of Georgia Railway Company.

The net income as shown by returns is held to be taxable income under the provisions of section 92-3113 of the income tax act of 1931, as amended, which states: "The tax imposed by this law shall apply to the entire net income, as herein defined, received by every domestic corporation, and every foreign corporation owning property or doing business in this State." —Taxpayer corporation is not included in the classification of corporations and organizations exempt from tax, as provided in section 92-3105 of the act, therefore, the entire net income of taxpayer is subject to Georgia income tax.

[fols. 83-84] Department of Revenue,
State of Georgia
M. E. Thompson, Commissioner

Atlanta, August 30, 1945.

In your reply refer to ITA:REC:LH

ITA—11656

Georgia Railroad and Banking Company,
Augusta, Georgia.

Dear Sirs:

There is attached a statement of adjustments which this office proposes to make in your income tax liability for the years in question as follows:

Year	Additional Tax	Penalty	Interest	Total
1942	16,873.87	-0-	2,615.45	19,489.32
1943	13,789.91	-0-	1,310.04	15,099.95
Totals	$30,663.78	-0-	$3,925.49	$34,589.27

[fol. 85] Georgia Railroad and Banking Company
Augusta, Georgia

Schedule No. 1

Net Income and Computation of Tax

Calendar Years	1942	1943
Net income, per returns	(145,174.32)	(158,452.65)
Add:		
(a) Item claimed to be exempt from income tax	600,000.00	600,000.00
	454,825.68	441,547.35
Deduct:		
(b) Federal income tax	148,028.00	190,821.66
Net income, as corrected	306,797.68	250,725.69
Tax at 5½%	16,873.87	13,789.91
Less: Tax previously paid	-0-	-0-
Additional Tax	16,873.87	13,789.91
Interest at 6% to October 15, 1945	2,615.45	1,310.04
Deficiency to October 15, 1945	19,489.32	15,099.95

Schedule No. 1-A

Explanation of Items Changed in Schedule No. 1

(a) Item claimed to be exempt from income tax	600,000.00	600,000.00

Taxpayer is the owner and lessor of railroad properties located in the State of Georgia, which properties are leased jointly to the Atlantic Coast Line Railroad Company and the Louisville and Nashville Railroad Company for an annual rental of $600,000.00. Taxpayer claims that the rental received for its railroad properties is not subject to the State of Georgia income tax act, that the act of 1931, as amended, does not supersede prior acts of the General Assembly of Georgia, and therefore, the exemption claimed is an allowable deduction. The deduction of the $600,000.00 [fol. 86] exemption claimed is disallowed on the grounds that taxpayer corporation is not included in the classification of corporations and organizations exempt from tax,

as provided in section 92-3105 of said act, it being held that taxpayer is subject to the provisions of section 92-3313, which states: "The tax imposed by this law shall apply to the entire net income, as herein defined, received by every *domestic corporation*, and every foreign corporation owning property or doing business in this State."

(b) Federal income tax 148,028.00 190,821.66

To allow the deduction of Federal income tax in the above amounts, which were shown on returns but not deducted from gross income.

[fols. 87-88] Department of Revenue,
State of Georgia
M. E. Thompson, Commissioner

Atlanta, August 30, 1945.

In your reply refer to ITA:REC:LH

ITA—11657

The South Western Railroad Company,
404 Bankers Insurance Bldg.
Macon, Georgia.

Dear Sirs:

There is attached a statement of adjustments which this office proposes to make in your income tax liability for the years in question as follows:

Year	Additional Tax	Penalty	Interest	Total
1942	27,943.61	-0-	4,331.26	32,274.87
1943	30,238.93	-0-	2,872.70	33,111.63
Totals	$58,182.54	-0-	$7,203.96	$65,386.50

[fol. 89] Copy

The South Western Railroad Company,
404 Bankers Insurance Bldg.,
Macon, Georgia.

Schedule No. 1

Net Income and Computation of Tax

Calendar Years	1942	1943
Net income, per returns	362,794.01	506,371.27
Add:		
(a) Income claimed to be exempt from Georgia income tax	552,204.55	770,732.06
	914,998.56	1,277,103.33
Deduct:		
(b) Federal income tax	44,138.94	220,933.30
Net income as corrected	870,859.62	1,056,170.03
Tax at 5½%	47,897.28	58,089.35
Less: Tax previously paid	19,953.67	27,850.42
Additional tax	27,943.61	30,238.93
Interest at 6% to October 15, 1945	4,331.26	2,872.70
Deficiency to October 15, 1945	32,274.87	33,111.63

Schedule No. 1-A

Explanation of Items Changed in Schedule No. 1

(a) Income claimed to be exempt from Georgia income tax	552,204.55	770,732.06

Taxpayer is the owner and lessor of certain railroad properties located in the State of Georgia. These properties are leased to the Central of Georgia Railway Company. Taxpayer claims that 60.34% of its net income from rentals and other income is not subject to income tax to the State of Georgia under the terms of its charter, and that the act of the General Assembly of Georgia granting said charter supersedes the income tax act of 1931, as amended. The [fol. 90] above amounts were excluded from income before computing the tax on returns filed for the current years.

It is held that the income tax act of 1931, as amended, supersedes prior laws of Georgia with reference to taxes; that taxpayer corporation does not come under the provisions of section 92-3105 of the act, which classifies corporations and organizations exempt from tax; but that taxpayer is subject to Georgia income tax on 100% of its net income under the provisions of section 92-3113, which states: "The tax imposed by this law shall apply to the entire net income, as herein defin i, received by every domestic corporation, and every foreign corporation owning property or doing business in this State."

Therefore, the above amounts which were excluded by taxpayer on returns are held to be taxable by the State of Georgia, and the amounts have accordingly been restored to taxable income.

Calendar Years	1942	1943
(b) Federal income tax	44,138.94	220,933.30

To allow deduction of additional Federal income tax in the above amounts, computed as follows:

Year 1942		
1941 Federal Income Tax paid in 1942	73,150.38	
Amount claimed on return	29,011.44	
Additional Federal income tax allowable	———	44,138.94
Year 1943		
1942 Federal income tax paid in 1943	366,147.33	
Amount claimed on return	145,214.03	
Additional Federal income tax allowable	———	220,933.30

[fol. 91] Copy

Corrected ITA No. 11657

The Southwestern Railroad Company
404 Bankers Insurance Building
Macon, Georgia.

Schedule No. 1

Net Income and Computation of Tax

Calendar Years	1942	1943
Net income per ITA No. 11657	870,859.62	1,056,170.03
Add:		
(a) Federal income tax	44,138.94	220,933.30
Net income as corrected	914,998.56	1,277,103.33
Tax at 5½%	50,324.92	70,240.08
Less: Tax previously paid	19,953.67	27,850.42
Additional tax	30,371.25	42,390.26
Interest at 6% to October 15, 1945	4,707.54	4,027.07
Deficiency to October 15, 1945	35,078.79	46,417.33

Schedule No. 1-A

Explanation of Items Changed Sch. No. 1

(a) Federal income tax	44,138.94	220,933.30

To restore to taxable income, Federal income tax in the above amounts, which were deducted through error in original ITA since the deduction was included in the net figures of "Net income, per return."

[fol. 92] Copy

DEPARTMENT OF REVENUE
STATE OF GEORGIA
M. E. THOMPSON, Commissioner

Atlanta, September 18, 1945.

In your reply refer to ITA:REC:LH.

THE SOUTHWESTERN RAILROAD COMPANY,
404 Bankers Insurance Building, Macon, Georgia.

In re: Corrected ITA No. 11657

Dear Sirs:

On August 30, 1945, we mailed you a copy of our agent's report covering the years 1942 and 1943.

From subsequent information furnished, or from information we have secured, we have recomputed your tax liability for the above years as follows:

Year	Additional Tax	Interest	Total
1942	30,371.25	4,707.54	35,078.79
1943	42,390.26	4,027.07	46,417.33
Totals	72,761.51	8,734.61	$81,496.12

Please attach the enclosed supplemental report to the original report as the revised basis of our proposed assessment.

Yours very truly, Department of Revenue Income Tax Unit. By: R. E. Collins, Jr., Agent in Charge.

[fol. 93] Copy

STATE OF GEORGIA
DEPARTMENT OF REVENUE
Property and Income Tax Unit

M. E. THOMPSON, Commissioner.
B. E. THRASHER, Chief Clerk.

512 State Office Building,
Atlanta, August 28, 1945.

THE SOUTH WESTERN RAILROAD COMPANY,
and
Hon. ANTON P. WRIGHT, President, Savannah, Georgia.

Dear Sirs:

The South Western Railroad Company having failed to file full and complete tax returns with the State Revenue Commissioner of the State of Georgia for the years 1939 through 1945, inclusive, you are hereby notified of such delinquency and are demanded to make full and complete tax returns to the State Revenue Commissioner within twenty days, as provided by law, covering all the taxable property of said South Western Railroad Company, for State, County, Municipal and school taxes.

Very truly yours, Department of Revenue, M. E. Thompson, Commissioner.

Blanks will be furnished upon request.

[fol. 94] Letter to Augusta & Savannah Railroad and Hon. Charles Ellis, president, and also letter to the Georgia Railroad & Banking Company and Hon. C. H. Phinizy, president, identical to the letter to the Southwestern Railroad Company.

Certificate of M. E. Thompson, commissioner of revenue, as to the correctness of the foregoing copies.

[fol. 95] EXTRACT FROM AGREED STATEMENT OF FACTS

Agreed Statement of Facts, pages 47 to 61, is omitted as being immaterial, except the following extract from said agreed statement of facts:

"Taxes paid by the lessor."

"The lessor since the lease, during the thirty years, as before the lease, has annually returned the net earnings of the chartered property—not the rental—for taxation, and has paid to the State one-half of one per cent on the net earnings and not on the rental."

[fol. 96] EXTRACT FROM VALUATION DOCKET NO. 312

Extract from the Valuation Docket No. 312 of Interstate Commerce Commission, Georgia Railroad (lessee organization) and Georgia Railroad and Banking Company, which was reported in 125 I. C. C. Reports, p. 551, the particular extract being on page 592, and being as follows:

"Acquired by Construction. The Georgia constructed about 214 miles of its line of railway. The construction work was performed either by Georgia's own forces, or by contractors working under its supervision. The first surveys were commenced in November, 1834, the first actual construction work was begun in June, 1835, and the first mileage, from Augusta to a point about 11 miles west of that place, was opened for operation in May, 1837. The line was extended to Atlanta in sections, the last being completed in September, 1845. The branch line between Camak and Warrenton was opened for operation in January, 1838, and that between Union Point and Athens in December, 1841."

[fol. 97] IN SUPERIOR COURT OF CHATHAM COUNTY
No. 11741.

Appeal from assessment of Income Taxes
December Term, 1945.

M. E. THOMPSON, as State Revenue Commissioner, Plaintiff in Error,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, Defendant in Error.

Bill of Exceptions—Filed March 5, 1946

To the Supreme Court of Georgia:

Be it remembered that on the 5th day of November, 1945, at the regular September Term of the superior court of Chatham County, Georgia, before the Honorable Robt. H. Humphrey, judge pro hac vice presiding, and by consent of the parties without the intervention of a jury, there came on to be tried the case of Atlantic Coast Line Railroad Company, appellant, v. M. E. Thompson, as State revenue commissioner of Georgia, appellee, the same being an appeal from an assessment for income taxes by the said M. E. Thompson, as State revenue commissioner, and an appeal therefrom to the superior court of Chatham County, Georgia.

The Atlantic Coast Line Railroad Company having pleaded an exemption from the taxes assessed in said action by virtue of section XV of the act of 1833, to wit: "The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them; and after that, shall be subject to a tax not exceeding one half per cent per annum on the net proceeds of their investments." which act of 1833 the said appellant alleged created the Georgia Railroad and Banking Company, the said M. E. Thompson, as State revenue commissioner, appellee, filed his special plea alleging that the said section XV was unconstitutional under the constitution of 1798, under the [fol. 98] constitution of 1877 and under the constitution of 1877, as amended in 1945, in so far as it applied to the granting of an exemption which appellant claimed. A

copy of the material portions of which special plea is hereto attached and marked "Exhibit A."

The hearing on said special plea was held and considered at the same time as the other questions involved were heard and on the 25th day of January, 1946, the court ruled against the said M. E. Thompson, as State revenue commissioner, on each and every ground of said special plea and ruled that said section XV of the act of 1833 was constitutional, and the said M. E. Thompson, as State revenue commissioner, appellee, excepted and now excepts and assigns error upon the rulings thereon excepted to, and says that section XV of the act of 1833, set out above, in so far as it applies to the claim of exemption of the appellant, Atlantic Coast Line Railroad Company, is unconstitutional for the reasons set out in said special plea, and that the court erred in not sustaining said plea and holding that said section XV of the Act of 1833 was unconstitutional on each and every ground alleged therein, and that the plea of exemption to the taxes assessed constituted no defense thereto. That said judgment holding said section XV was constitutional was injurious to plaintiff in error, entered into the final judgment and controlled the final judgment against him.

The aforesaid plea also contained an allegation that in the act of 1835, which appellee contended created the Georgia Railroad and Banking Company, which act of 1835 contained sections XIII and XIV, to wit:

"Sec. XIII. The act to which this is an amendment, shall be and remain in full force and effect, in every section and clause thereof, except where it conflicts with the provisions of this act."

"Sec. XIV. All the acts done and contracts made by the Georgia Railroad Company, are hereby declared to be [fol. 99] of binding efficacy on the Georgia Railroad and Banking Company; and all the rights to property acquired by the Georgia Railroad Company, of whatsoever nature or kind the same may be, shall pass to and be vested in the Georgia Railroad and Banking Company as fully and completely as they were vested in the said Georgia Railroad Company."

which attempted to convey the rights of the Georgia Railroad Company created by the act of 1833 aforesaid to the Georgia Railroad and Banking Company,

and appellee alleged that these two sections were unconstitutional in so far as they attempted to convey to the Georgia Railroad and Banking Company any tax exemption set forth in section XV of the act of 1833 under the same constitution and for the same reasons as was alleged that section XV of the act of 1833 was unconstitutional. The court overruled on January 25, 1946, said portion of the special plea, and the said M. E. Thompson, as State revenue commissioner, excepts and assigns error upon the overruling thereof and excepted to same and now excepts and says that in so far as the sections apply to the claim of exemption of Atlantic Coast Line Railroad Company, these sections conflict with the same sections of the same constitutions of Georgia in the identical manner and for the same reasons as section XV, set out above. That overruling said plea entered into the final judgment which was against movant and controlled said judgment adversely to movant. That the court erred in not sustaining said plea and holding that said sections were unconstitutional and that the plea of exemption to the taxes assessed constituted no defense thereto.

On the 2nd day of February, 1946, the court presiding on said case without the intervention of a jury after having heard the evidence introduced by both parties, rendered on said date its judgment in favor of the appellant, Atlantic Coast Line Railroad Company, upholding its claim of exemption from the taxes assessed and rendered its judgment in favor of the said appellant. [fol. 100] To the ruling and judgment of the court, the said M. E. Thompson, as State revenue commissioner, the appellee, now excepts and assigns error thereon and says that the court erred in sustaining said plea of exemption and giving judgment for the said appellant, and says that there was no evidence to sustain said plea of exemption, and the court abused its discretion in holding that there was evidence to sustain said plea of exemption and judgment in said plea of exemption; that said judgment was contrary to law, and that the court erred in granting judgment in favor of the appellant.

That after said judgment was rendered in favor of the appellant, Atlantic Coast Line Railroad Company, the appellee, M. E. Thompson, as State revenue commissioner, made his motion for new trial in the regular

course and within the time provided by law, with the evidence duly approved by the court said motion came on for a hearing on the 21st day of February, 1946, and during the same term of said court, and the recital of facts in the several grounds of the motion were approved and said motion was by the court overruled on each and all of the grounds therein stated, the case thus illegally terminated.

To this judgment of the court the appellee excepted and now excepts and assigns error thereon as being contrary to law and said that the court erred in overruling said motion for a new trial on each and all of the grounds therein stated.

The appellee, M. E. Thompson, as State revenue commissioner, specifies the following portions of the record in said case as material to the errors therein complained of in this bill of exceptions:

1. Certified copies of parts of the record filed in office June 11, 1945, including the following:

(a) Statement of proposed adjustment in income tax liability, dated November 15, 1944.

[fol. 101] (b) Protest filed by Atlantic Coast Line Railroad Company, dated December 11, 1944.

(c) Letter dated December 14, 1944, granting conference.

(d) Notice of denial of petition and redetermination of deficiency, dated March 5, 1945.

(e) Notice of assessed deficiency in income tax, dated March 5, 1945.

(f) Schedules of net income and computation of tax for years 1941, 1942, and 1943.

2. Certified copy of formal assessment filed in office June 25, 1945.

3. The appeal to Chatham superior court from the assessment of the revenue commissioner, filed in office March 15, 1945. Bond for costs and agreement of Atlantic Coast Line Railroad Co. as to the payment of taxes.

4. Letter and order of substitution of M. E. Thompson, as State revenue commissioner, as party appellee.

5. Amendment of appeal by appellant filed in office January 26, 1946.

6. Order appointing Judge Robt. H. Humphrey as judge pro hac vice, filed in office August 17, 1945.

6½. Special plea of M. E. Thompson.

7. The motion for new trial filed by M. E. Thompson, as State revenue commissioner, on the 21st day of February, 1946, with rule nisi and acknowledgment of services and approval of the grounds thereon.

8. The brief of evidence with the order and entries thereon, filed on the 21st day of February, 1946.

9. The judgment of the court rendered on January 26, 1946, holding that section XV of the act of 1833, p. 256, is constitutional.

10. The final judgment of the court in favor of the appellant, Atlantic Coast Line Railroad Company, dated [fol. 102] the 2nd day of February, 1946.

11. The judgment of the court certifying the grounds and overruling said motion for new trial, dated the 2nd day of March, 1946.

12. The entries of filing of each and all parts of the record above specified to be entered and transmitted in the proper order.

The Supreme Court of Georgia has jurisdiction over this case because there are questions of the constitutionality of statutes to be determined by the court.

And now within the time provided by law comes M. E. Thompson, as State revenue commissioner, plaintiff in error, and assigning error on all the rulings complained of as being contrary to law, tenders this bill of exceptions and prays that the same may be certified to as provided by law and transmitted to the Supreme Court of Georgia in order that the alleged errors may be submitted and corrected.

Eugene Cook, Attorney General, Claude Shaw, E. J. Clower, Victor Davidson, Assistant Attorneys General. Attorneys for Plaintiff in Error.

[fol. 103] EXHIBIT "A"

3

That portion of section XV of the act of 1833 limiting the tax on the *stock* of the Georgia Railroad Company, to wit: "The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them: and after that, shall be subject to a tax not exceeding one half per cent per annum on the net proceeds of their investments." in so far as it applies to the claim of exemption of the appellant in this case is null and void and in conflict with the constitution of 1798, which constitution was in force at the time of the passage of said act, and its amendments for each of the following reasons:

1. The caption of said act of 1833 reads as follows: "An act to incorporate the Georgia Railroad Company, with powers to construct a rail or turnpike road from the City of Augusta, with branches extending to the towns of Eatonton, Madison, in Morgan County, and Athens, to be carried beyond those places, at the discretion of said company, to punish those who may wilfully injure the same, to confer all corporate powers necessary to effect said object, and to repeal an act entitled, 'An act to authorize the formation of a company for constructing a railroad or turnpike from the City of Augusta to Eatonton, and thence westward to the Chattahoochee River, with branches thereto, and to punish those who may injure the same.'"

The granting of the portion of the sovereignty of the State of Georgia to said corporation, as set out at the end of section XV of said act, is a matter different from what is expressed in the title and by reason of same is repugnant to section XVII, article 1, of the constitution of 1798 which forbids the General Assembly to enact such acts, to wit: "Nor shall any law or ordinance pass containing any matter different from what is expressed in the title thereof."

[fol. 104] (a) Not merely is it repugnant to the letter of the constitution, as set out above, but it is repugnant to the spirit of the constitution of 1798 in that the provision is hidden in the main body of the act at the end of the fifteenth section where the average legislator would not be expecting to find such a provision, and by so being

placed and not referred to in the title contravenes the very purpose for which the constitution of 1798 was created, to wit: the prevention of another infamous Yazoo fraud, which had once been enacted by the General Assembly of Georgia, from being inflicted upon the people of Georgia again by means of concealment in the body of the act. The underlying spirit which caused the creation of the constitution of 1798 is as well known to the citizens of Georgia, judges, lawyers, and laymen as is the wording of that constitution itself, and by reason of this this court should recognize this and declare said portion of section XV unconstitutional, null and void, as repugnant to both the letter and the spirit of the constitution.

2. The said portion of section XV is in conflict with section XXII, article 1, of the constitution of 1798 which reads as follows: "The General Assembly shall have power to make all laws and ordinances which they shall deem necessary and proper for the good of the State which shall not be repugnant to this constitution." This provision of the constitution limits the General Assembly to the passage of those laws which are not repugnant to this constitution, either according to the letter or according to the spirit. The spirit of the constitution as well as the letter requires that any alienation of the sovereign power of the State is a matter so far different from the creation of a corporation that such grant of sovereignty is void for the reason that it was not expressed in the title.

3. The said portion of section XV is further repugnant to the constitution of 1798 and in conflict with [fol. 105] section XXIII of article 1 which limits the authority of the General Assembly and declares the rights of the people in the following words: ". . . and this convention composed of immediate representatives of the people chosen by them to assert their rights, and to revise the powers given by them to the government, and from whose will all ruling authority of right flows, doth assert and declare the boundaries of this State to be as follows . . . (giving the boundaries of Georgia) . . . Including and comprehending all the lands and waters within the said limits, boundaries and jurisdictional rights."

This exemption provision, set out in section XV of the act of 1833, is especially repugnant to the following portion of said section XXIII of article 1 of the constitution of

1798: "And this convention doth further declare and assert, that all the territory without the present temporary line and within the limits aforesaid, is now of right the property of the free citizens of the State, and held by them in sovereignty, inalienable but by their consent." This alienation of an essential element of sovereignty is in direct conflict with this provision of the constitution because only the free citizens of Georgia had the power to alienate this portion of the sovereignty of the State.

4. The granting of this portion of the sovereignty of the State of Georgia by the legislature is further prohibited by said section XXIII of said article wherein, after authorizing the legislature to convey to the United States government the western territory of the State, authorizes the legislature as follows: ". . . and may procure an extension of settlement, and an extinguishment of Indian claims in and to the vacant territory of this State, to the east and north of the said river Chattahoochee, to which territory such power of contract or sale by the legislature, shall not extend." This attempted grant of sovereignty to said Georgia Railroad Company was in the territory thus prohibited to the legislature.

[fol. 106] 5. This portion of section XV of the act of 1833 is further unconstitutional and void because said grant of the portion of the sovereignty of the State of Georgia is a donation or a gratuity in favor of said corporation and its stockholders and was not enacted by a concurrence of two-thirds of the General Assembly and is in conflict with the following portion of section XXIV of article 1 of the constitution of 1798, which reads as follows: "No vote, resolution, law, or order shall pass the General Assembly, granting a donation or gratuity in favor of any person whatever, but by the concurrence of two-thirds of the General Assembly."

6. This portion of section XV of the act of 1833 is further unconstitutional and void because said grant is in conflict with paragraph 1, section 1, article IV of the constitution of 1877, which reads as follows: "Taxation, a sovereign right. The right of taxation is a sovereign right—inalienable, indestructible—is the life of the State,

and rightfully belongs to the people in all Republican governments, and neither the General Assembly, nor any, nor all other departments of the government established by this constitution, shall ever have the authority to irrevocably give, grant, limit, or restrain this right; and all laws, grants, contracts, and all other acts, whatsoever, by said government, or any department thereof, to effect any of these purposes, shall be, and are hereby, declared to be null and void, for every purpose whatsoever; and said right of taxation shall always be under the complete control of, and revocable by, the State, notwithstanding any gift, grant, or contract, whatsoever, by the General Assembly."

7. This portion of section XV of the act of 1833 is further unconstitutional and void because said grant of exemption from taxation conflicts with paragraph III, Section III, article I of the constitution of 1877, as amended in 1945, which reads as follows: "Revocation of tax ex-[fol. 107] emptions. All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void."

ORDER

I do certify that the foregoing bill of exceptions was tendered to me on the 21st day of February, 1946, that the same is true, and specifies all of the record material to a clear understanding of the errors complained of; and the clerk of the superior court of Chatham County is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the next term of the Supreme Court that the errors alleged to have been committed may be considered and corrected.

This 2nd day of March, 1946.

R. H. Humphrey, Judge, Pro Hac Vice, Superior Court, Chatham County.

Due and legal service of the within bill of exceptions is hereby acknowledged, and copy and all other or further notice or service are hereby waived.

This 4th day of March, 1946.

T. M. Cunningham, Carl H. Davis, Alston, Foster, Sibley & Miller, Attorneys for Defendant in Error.

[fols. 108-109] Clerk's Certificate to foregoing bill of exceptions omitted in printing.

[File endorsements omitted]

[fol. 110] In Supreme Court of Georgia.

No. 15480.

Thompson, State Revenue Commissioner,

v.

Atlantic Coast Line Railroad Company.

Opinion—June 6, 1946.

By the Court:

1. Where a perpetual corporate charter granted by the legislature confers tax exemptions upon the corporation, the exemption is irrevocable. Accordingly, article 1, section 3, paragraph 3 of the constitution of 1945 (Ga. L. 1945, p. 8), purporting to revoke such charter provisions, is void and of no effect.

2. Where, as here, such charter provision limits the tax on the "stock" of the corporation to ½ of 1 percent "on the net proceeds of their investments," it is a property tax and constitutes no bar to the collection by the State under the 1931 income tax law as amended (Ga. L. 1931, Ex. Sess., p. 24) of an income tax from a lessee of the corporation on its net income derived from the use of the corporate property on which the charter thus limits the property tax.

[fol. 111] Atlantic Coast Line Railroad Company, in resistance to a tax assessment by the State Revenue Commissioner for income taxes for which the commissioner claimed that it was liable under the 1931 income tax

statute as amended (Ga. L. 1931, Ex. Sess., p. 24), claimed that it was exempt from such tax assessment under an act of 1833 (Ga. L. 1833, p. 256), incorporating Georgia Railroad Company, which later by amendment to its charter became Georgia Railroad and Banking Company; and that the income against which the tax under the assessment is claimed was realized as a lessee in the operation of the railroad. The assessment was appealed to the superior court and the case was submitted to the judge without the intervention of a jury.

The railroad filed a special plea of res adjudicata, alleging that the judgments in the cases of State of Georgia v. Georgia Railroad and Banking Co., 54 Ga. 424, and Wright v. Georgia Railroad and Banking Co., 216 U. S. 420, were res adjudicata in the present case. The State filed a special plea attacking the act of 1833 upon constitutional grounds. In this plea it was contended that section 15 of the act, which provides for the tax exemption of the stock of the corporation, was unconstitutional in so far as it applied to the claim of exemption of Atlantic Coast Line Railroad Company; and that it was in conflict with section 17, article 1, of the constitution of 1798, which declared, "nor shall any law or ordinance pass, containing any matter different from what is expressed in the title thereof." The plea further alleged that sections 13 and 14 of the act of 1835 amending the original charter, in so far as they attempted to convey any income tax exemptions granted the original corporation of Georgia Railroad Company to Georgia Railroad and Banking Company, conflicted with the constitutions of 1798, 1877, and 1945, as containing matter foreign to that indicated in the caption of the act. It was further alleged that section 15 of the original charter was in [fol. 112] conflict with section 22, article 1, of the constitution of 1798, which declared that the General Assembly shall have power to enact any law it deems necessary and proper for the good of the State which is not repugnant to the constitution. This attack is based upon the contention that the provision under attack is repugnant to the constitution because it is a grant of sovereignty and was not expressed in the title. Other constitutional attacks were set forth in the plea.

There was no conflict in the evidence as to the material facts. It was shown that Georgia Railroad and Banking

Company, on May 7, 1881, leased the railroad properties to William M. Wadley and his assigns for a term of 99 years, beginning April 1, 1881, for an annual rental of $600,000.00; and that by successive leases and assignments Atlantic Coast Line Railroad Company became and is the lessee of a one-half interest in the railroad property. It has, at all times up to the present, made payments to the State of taxes on its stock on the basis provided in section 15 of its charter, by paying as there provided ½ of 1 per cent of net income realized from the operation of the railroad. In making these calculations and payments, the corporation took the net income of Atlantic Coast Line Railroad Company during each year it had operated, and calculated ½ of 1 per cent of such net income and paid that amount to the State. Atlantic Coast Line Railroad Company has at no time paid any property tax on its lease, nor has it paid any income tax on the net income realized from its operation of the railroad. It was stipulated that section 15 of the act of 1833, supra, if valid and applicable to this case, applied to the main line of Georgia Railroad and Banking Company from Augusta to Atlanta, Georgia, and to the branch line from Union Point to Athens. It was further stipulated that the State of Georgia had never before demanded that the lessees of the railroad should return the net income re-
[fol. 113] ceived from the operation of the main line and the Athens branch; and that similar assessments have been made against Louisville and Nashville Railroad Company, which owned the other half interest in the lease.

The trial court overruled the State's special plea questioning the constitutionality of section 15 of the original charter, and rendered judgment in favor of the railroad. The State revenue commissioner excepts to a judgment overruling his motion for new trial, and assigns error also on the judgment overruling his special plea raising the constitutional question.

[fol. 114] Duckworth, Justice. (After stating the foregoing facts.)

1. There appears in the constitution of 1945 (article 1, section 3, paragraph 3) the following provision: "All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void."

There are two specific and inescapable legal reasons why the provision of the new constitution just quoted does not and can not alter or affect the existing rights of the Atlantic Coast Line Railroad Company involved in this case. The first of these solid legal reasons is that the quoted provision does not purport to be retroactive; and even if it was expressly made retroactive, it would nevertheless be completely ineffective in so far as the fixed and established rights of this party are here concerned. The second reason is that this State is powerless by legislative enactment or constitutional provision to nullify or impair in any respect whatever its existing contractual obligations. If the charter provisions referred to are invalid, there would be no need for this constitutional declaration. If they are valid, then this declaration is empty and without legal effect. Article 1, section 10, Constitution of the United States; Wheeler v. Board of Trustees, 200 Ga. (37 S. E. 2d, 322). By such charter provisions the State became a party to a contract, and however great the financial losses resulting from such tax limitation may be, such loss is nothing compared to the integrity and the solemn duty of the State to discharge fully any and all contractual obligations which it legally assumed.

2. In the view that we take of this case, we find it unnecessary to pass upon the validity of section 15 of the charter, upon which the railroad relies. If it be conceded that the charter provision referred to is valid, that the legislative branch of the government had the legal power thus to surrender a part of the sovereignty of the State and thereby tie the hands of all future legislatures, [(fol. 115] in so far as legislating freely upon the question of taxation of this corporation, and if it be conceded that the constitutional inhibition against the inclusion, in the body of an act, of matter different from and foreign to the subject embraced in the caption did not render this act void—we come, after all, to the plain provision of the charter which is dealing with and is confined to the subject of a property tax, unrelated to the question we now have of the liability of the corporation for its share of an income tax under the existing laws of the State. The exact language of the charter upon which the railroad relies is as follows: "The stock of the said company and its branches shall be exempt from taxation for and

during the term of seven years from and after the completion of the said railroads or any one of them; and after that, shall be subject to a tax not exceeding one-half per cent per annum on the net proceeds of their investments."

The decisive question is, whether or not this charter provision refers to and embraces income taxes, or is limited strictly to a property tax. It can not be denied that any and all tax exemptions must be strictly construed, and unless the language clearly grants the exemption, it is the duty of the court to rule in favor of the State and against the corporation. Here we have the very foundation of the exemption or limitation stated at the outset to have reference to "the stock of the said company and its branches." If the rule of construction of exemptions above referred to is to be given any meaning whatever, it compels a construction of this provision that limits it to the stock or property of the corporation. Had it been intended that the corporation as a legal entity should forever be free from any sort or form of taxation except the one-half of one percent as therein provided, it would have been a simple matter to have so provided and thus to have made clear such an intent. In failing to make clear such an intent, it is assumed that the legislature [fol. 116] intended that the courts apply the rule of construction and restrict the exemption to the limits there stated, and never extend it by writing in something more. There should be no difficulty in seeing clearly that the reference to income was intended solely as a statement of a basis for the calculation of the property taxes there expressly referred to. The fact that the net income is made this basis, and the tax limited to one-half of one per cent of such income, in no wise renders the provision one for an income tax against the corporation. A number of railroad charters existing at the time or subsequently granted contained similar provisions for taxation, but there existed in this State at that time no general law providing for income taxes. It was almost a century thereafter before the legislature enacted our present income tax statute.

We are not unmindful of certain language of the Federal courts indicating that those courts regarded the tax referred to in this charter provision as an income tax. See Wright v. Georgia Railroad and Banking Co., 216 U. S. 420; Wright v. Louisville & Nashville Railroad, 236

U. S. 687; Georgia Railroad and Banking Co. v. Wright, 132 Fed. 912. In Wright v. Georgia Railroad and Banking Co., supra, at page 431, it is said: "That railroad is the product of the investment of the authorized capital, and is, as such, subject only to a tax based upon its 'net proceeds.' This plan of tax upon net earnings is quite consistent with any other form of taxation, and is absolutely independent of any question as to whether the property thus taxed only upon its profits should have a less or greater value than the capital invested." Again, at page 432, it is said: "If we are right in construing the tax as one upon net income as a substitute for a property tax, the franchise may no more be taxed than any other property appropriate to the operation of the road." It is obvious from the language of the Supreme Court just [fol. 117] quoted that the only question then being considered by that court was whether or not the property of the railroad could be further taxed. There was not before the court, and indeed it may well be doubted if the court thought of whether or not the corporation could be subjected to a State income tax under a valid law of the State thereafter enacted. Although that court said that it construed the charter provision to constitute a substitute for a property tax, this does not alter the legal question now involved, for it makes no difference whether the charter provision dealt expressly and exclusively with a property tax or provided that an income tax of one-half of one per cent might be collected as a substitute for a property tax. It was after all and nevertheless dealing with the subject of a property tax, and not with the subject of an income tax. We, therefore, hold that section 15 of the charter relates only to a property tax and has no bearing on the question of income taxes. The conduct of the corporation and of this lessee, as well as the State officials, points clearly to the fact that all of them interpreted this provision to relate solely to a property tax. This is shown by the fact that Georgia Railroad and Banking Company has throughout the period of this lease yearly paid taxes to the State. It arrived at the amount of taxes due by taking one-half of one per cent of the net income, not its net income, but the net income of Atlantic Coast Line Railroad Company earned by the use of this property. If this tax was an income tax, as

contended by the railroad, then the earner of that income would be the proper party to pay the tax. The net income used as a basis for the calculation of the amount of taxes was the net income of Atlantic Coast Line Railroad Company, in which Georgia Railroad and Banking Company had no interest whatever. Obviously, Georgia Railroad and Banking Company had no obligation to pay an income tax on income in which it had no interest whatever. [fol. 118] It paid the taxes on its property in conformity with the provision of its charter, because it recognized its legal obligation for the payment of property taxes upon its own property, and not because it was due the State an income tax arising from income belonging entirely to this lessee.

Having decided that the charter refers to a property tax on the stock of the corporation, and that only, we move on to the further question of whether or not the charter is a bar to the collection of the income tax here sought, which tax is based upon a law enacted in 1931 as amended, Code, Ann. Supp., § 92-3102, as follows: "Every domestic corporation and every foreign corporation shall pay annually an income tax equivalent to five and one-half per cent of the net income from property owned or from business done in Georgia, as defined in section 92-3113; Provided, that the amount of the tax shall not be less than would be produced by applying a rate of two per cent to a base consisting of the entire net income, as defined in this Title, plus all salaries and other compensation paid to all elected and appointed officers, and to the stockholder owning in excess of five per cent of the issued capital stock of the corporation or a relative per centum of the capital stock of any other corporation owning or holding the capital stock of such corporation, and after deducting from such base $10,000 and the deficit, if any; such tax shall be assessed upon the base provided by this section which will produce the greater tax."

In Mayor &c. of Savannah v. Hartridge, 8 Ga. 23 (1), this court recorded its definite opinion to the effect that there was a well-defined and marked distinction between a property tax and an income tax or capitation tax. It was there stated: "Taxation, in reference to the subject matter, is divided by writers on political economy, as well as the tax laws of all governments, into three classes—

capitation, property, and income; and where one or more [fol. 119] is treated of or acted upon, *the other is never intended.*" (Italics ours.) This declaration by the court of last resort of this State in the early years of its existence established the policy of our law as one refusing to mix or confuse the three types of taxes. It was a wise and safe guide then. It remains so today, and while that decision was rendered several years after the enactment of the charter here involved, it must be assumed that the legislature, when enacting this charter, was acquainted with the fact as there recited that "writers on political economy, as well as the tax laws of all governments," thus divided the forms of taxation and adhered to the rule that, where one or more of the forms of taxation are treated or acted upon, "the other is never intended." It is further said in headnote 3 of the cited case, that: "A charter, authorizing a municipal corporation to tax real and personal estate, does not, necessarily, confer the right to tax income." This principle, stated differently to apply to the present case, means that the charter here, limiting to ½ of 1 per cent of the income tax that may be levied against the stock (personal or real estate), does not necessarily confer an exemption against an income tax. To the same effect, see Waring v. Mayor &c. of Savannah, 60 Ga. 93; Featherstone v. Norman, 170 Ga. 370 (153 S. E. 58). In Purnell v. Page, 133 N. C. 125, 129 (45 S. E. 534), it is said: "The tax levied on income is not a property tax, but is a percentage laid on the amount which a man receives, irrespective of whether he spends it, wastes it, or invests it."

Since the railroad here plants its resistance to the tax sought to be collected squarely upon the charter provision of its lessor, and the contention that to apply the income tax law would offend the contract clause of the Federal constitution, article 1, section 10 (Code, § 1-134), which prohibits a State from enacting a law that impairs the obligation of a contract, the decisions of the United [fol. 120] States Supreme Court on this question are controlling and must be followed by the Supreme Court of Georgia. Without here entering upon an extended, and in so far as this case is concerned, useless discussion of the various decisions of that court in cases somewhat similar to the case now before us, we may rest our decision

upon the decision of that court in Hale v. State Board, 302 U. S. 95. It will be observed that in arriving at the conclusion there the Supreme Court accepted previous decisions of the Supreme Court of Iowa defining different forms of taxation. There the State of Iowa sought to collect an income tax under an income tax statute from the holder of certain county school-district and other public bonds that were issued prior to the enactment of the income tax statute, and at the time of the issuance of the bonds there existed in that State general laws prohibiting taxation of such bonds. Both the Supreme Court of Iowa and the Supreme Court of the United States—while recognizing that the law providing for exemption from taxation amounted to a contract, and the case was decided on the basis of this assumption—held that collection of the income tax did not constitute an impairment of the contract in violation of the Federal constitution. The Supreme Court pointed out that the nonexistence of an income tax law in the State at the time the legislature was enacting the law exempting the bonds from taxation showed that the legislature had no intention to include or refer to an income tax when enacting the exemption statute, and that, after all, the legislative intent was the controlling factor in a proper interpretation of the exemption statute. Such reasoning applies with compelling force in the present case. There existed in Georgia at the time this charter exemption was enacted no general law which would subject the corporation to the payment of an income tax. In the exemption clause it was expressly stated that the limitation there provided was upon the taxation [fol. 121] of the stock of the corporation, identical in this respect with the Iowa exemption law if a substitution of bonds for stock is made. Hence, here, as the Supreme Court said with reference to that case, the legislature of Georgia, in enacting this exemption clause, did not intend to include an income tax. Such limitation or exemption was not necessary, because in the absence of the same no income tax, under the law as it then existed, would have been exacted of the corporation. The decisions of this court above referred to commit this court to a construction of tax laws which excludes a tax not referred to in the specific system of taxation dealt with. This rule of construction, which was applied in the Iowa case above, will be followed and applied by this court.

We are impressed by the language employed by the Supreme Court in the above case, at page 109, where it is said: "The court is now concerned with the meaning and effect of particular contracts of exemption to be read narrowly and strictly. There is no room at such time for the freer and broader methods that have been thought to be appropriate in the development of the doctrine of implied restraints." By that plain language the Supreme Court gave definite meaning and the proper effect to the universal rule of construction which requires tax exemption laws to be strictly construed with all doubtful meanings resolved in favor of the taxing authority and against the exemption. Such language evidences a practical and reasoned approach, rather than a theoretical and mechanical one. As a legalistic theory it might be urged that, where property is by law exempted from taxation, the full benefit of such exemption is not realized if the owner is required to pay a tax calculated upon the income he receives from the ownership and the use of such property. But a practical construction and fair recognition of the extreme difference in the two methods of taxation expose the utter fallacy of such a theory. In the one case, the property would be subjected to [fol. 122] the payment of a tax irrespective of who was its owner in the absence of such exemption, while in the other case irrespective of the ownership of the property which constitutes the instrumentality with which an income is realized, and irrespective of the disposition of such income, the party receiving the income is required to pay a percentage thereof as an income tax chargeable against himself as the earner and not against the property. Bearing upon the question here decided and in harmony therewith, see Clyde v. Gilchrist, 262 U. S. 94; Mason Co. v. Tax Commn., 302 U. S. 186; Adams v. Saenger, 303 U. S. 59, 62; Rapid Transit Corp. v. New York, 303 U. S. 573; Adams Mfg. Co. v. Storen, 304 U. S. 307; Graves v. N. Y. ex rel. O'Keefe, 306 U. S. 466; U. S. Trust Co. v. Helvering, 307 U. S. 57.

In arriving at our decision, here holding a lessee of the railroad subject, under the income tax statute of the State, to the payment of the tax here claimed, we have not been unmindful of, but have given full consideration to, the previous decisions of this court and the Federal courts. We have not overlooked the fact that the Supreme

Court in Wright v. Georgia R. R. & Banking Co., 216 U. S. 420, affirmed a judgment of the lower court which enjoined the State officials from collecting or attempting to collect any taxes from Georgia Railroad and Banking Company except ½ of 1 per cent of its net income, as provided in section 15 of its charter. We do not regard that judgment as an obstacle to the collection of the present tax, for the reason that when it was rendered no income tax statute existed in Georgia, and, hence, the Federal court did not and could not have given consideration to the question of whether or not the corporation there, or as in the present case a remote lessee of the property, might be subjected to the payment of an income tax under the law now relied upon, enacted many years subsequently to that judgment. [fol. 123] A careful reading of the opinion in that case reveals that, notwithstanding the fact that the court many times used expressions indicating that the charter provision involved referred to an income tax, yet each time the court ultimately asserted that the tax there provided for was either a tax upon the stock or was a tax agreed upon as a substitute for a property tax. It is obvious, therefore, that, whether it was a property tax or a substitute for a property tax, it was not a substitute for an income tax, nor was it intended as a bar to the collection of an income tax under a proper law. The indisputable facts sustain the revenue commissioner's claim. The law under which the income tax assessment was made is a valid law of this State, and there being no legal obstacle to the collection of the tax here claimed, a judgment in favor of the State revenue commissioner was demanded, and the court erred in rendering judgment in favor of Atlantic Coast Line Railroad Company.

Judgment reversed, with direction. Bell, C. J., Jenkins, P. J., Duckworth, Atkinson, and Wyatt, JJ., and Judges Gordon Know and Carl E. Crow, concur. Head and Candler, JJ., disqualified.

[fol. 124] IN SUPREME COURT OF GEORGIA

M. E. THOMPSON, STATE REVENUE COMMISSIONER,

v.

ATLANTIC COAST LINE RAILROAD COMPANY.

JUDGMENT—June 6, 1946.

This case came before this court upon a writ of error from the superior court of Chatham county; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed because the court erred in refusing a new trial. Direction is hereby given that the trial court vacate its former judgment in favor of the Atlantic Coast Line Railroad Co., and enter a judgment denying the appeal of said company and rendering judgment in favor of M. E. Thompson, State revenue commissioner, sustaining the tax assessment as made. Bell, C. J., Jenkins, P. J., Duckworth, Atkinson and Wyatt, JJ., and Judges Knox and Crow concur. Head and Candler, JJ., disqualified.

[fol. 125] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed July 15, 1946.

To the Chief Justice of the Supreme Court of the State of Georgia:

Your petitioner, Atlantic Coast Line Railroad Company, respectfully shows:

1. Your petitioner is the appellant in the above entitled cause.

2. Georgia Railroad & Banking Company leased its properties to William M. Wadley and by successive transfers, Atlantic Coast Line Railroad Company and Louisville & Nashville Railroad Company eventually became the lessees, each being the lessee of one-half interest in the property covered by the lease to William M. Wadly.

3. Section 15 of the charter of Georgia Railroad Company (Acts 1833, p. 256) provides: "The stock of the

said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them; and after that, shall be subject to a tax not exceeding one-half per cent per annum on the net proceeds of their investments."

The name of the Georgia Railroad Company was changed to Georgia Railroad & Banking Company (Acts 1835, p. 181).

The above tax limitation quoted from section 15 of the charter of 1833 is applicable only to the main line of [fol. 126] railroad from Augusta, Ga., to Atlanta, Ga., and the branch from Union Point, Ga., to Athens, Ga.

4. March 5, 1945, J. Eugene Cook, State revenue commissioner, assessed against Atlantic Coast Line Railroad Company deficiency income taxes for the years 1941, 1942, and 1943, in respect of one-half of the income derived from the operation under said lease of the main line of the Georgia Railroad and the branch to Athens. The amount of deficiency taxes as assessed for the three years was, principal $179,271.80, with interest to March 5, 1945, of $20,218.13, besides interest from March 5, 1945, on the principal sum at the rate of 1% per month until paid.

The State revenue commissioner assessed similar deficiency income taxes in the same amount against Louisville & Nashville Railroad, lessee of the other one-half interest of the Georgia Railroad.

There is no dispute as to the amount of the assessments. The whole question is as to the validity of the assessments.

5. The tax assessed under the income tax act of March 31, 1931, and its amendments (Acts 1931, Ex. Sess. p. 24, now codified in Code Section 92-3102) which reads as follows: "Every domestic corporation and every foreign corporation, shall pay annually an income tax equivalent to five and one-half per cent. of the net income from property owned or from business done in Georgia, as is defined in section 92-3113."

In assessing the tax the commissioner gave no effect to the tax limitation in the charter, and made no allowance for the one-half of 1% paid by the lessor.

6. Atlantic Coast Line Railroad Company duly protested the assessment of said tax deficiency as allowed by Code section 92-84-32 (Code of Georgia Annotated) on the ground that said section 15 of the charter of the Georgia Railroad and Banking Company in an irrevocable and an inviolable contract of the State of Georgia and that the [fol. 127] said income tax act of March 31, 1931, as applied by the State revenue commissioner, so as to tax the Atlantic Coast Line Railroad Company with the income of the main line of the Georgia Railroad from Augusta to Atlanta and the branch to Athens; which it receives as lessee of the Georgia Railroad, is unconstitutional, null and void, and contrary to article 1, section 10, paragraph 1, of the constitution of the United States which provides that no State shall pass any law impairing the obligation of contracts, and that the assessment made by the State Revenue Commissioner under said income tax act of 1931 was, therefore, null and void.

The protest was overruled by the commissioner and Atlantic Coast Line Railroad Company duly appealed from the said assessment to the superior court of Chatham County, as allowed by Code section 92-8446 (Code of Georgia Annotated) its principal place of doing business in the State of Georgia being in said county. The appeal under the laws of Georgia opens up the whole matter to a de novo investigation. On the appeal Atlantic Coast Line Railroad Company renewed in its appeal its contention that section 15 of the charter of Georgia Railroad & Banking Company was an irrevocable contract, and that the income tax act of March 31, 1931, as applied by the State revenue commissioner to tax Atlantic Coast Line Railroad Company, as above stated, was unconstitutional and contrary to the contract clause of the constitution of the United States, as above stated.

7. J. Eugene Cook, State tax commissioner, having resigned, M. E. Thompson was appointed State revenue commissioner in his place, and was duly substituted as the appellee in this case.

8. The case was heard by the judge without a jury and the appeal was sustained and the assessment declared null and void by the court.

The State revenue commissioner then made a motion [fol. 128] for new trial which was overruled by the court and, thereupon, he sued out a bill of exceptions to the Supreme Court of Georgia.

9. The Supreme Court of the State of Georgia reversed the judgment of the superior court, because the court erred in refusing a new trial and in said judgment direction was "given that the trial court vacate its former judgment in favor of Atlantic Coast Line Railroad Company and enter a judgment denying the appeal of said company and rendering judgment in favor of M. E. Thompson, State revenue commissioner, sustaining the tax assessment as made."

10. The Supreme Court of the State of Georgia is the highest court of said State in which a decision in this suit can be had. In said cause there is drawn in question the validity of a statute of the State of Georgia on the ground that said statute is repugnant to the constitution and laws of the United States and the decision is in favor of its validity, notwithstanding your petitioner's contention that said statute violates article 1, section 10, paragraph 1, of the constitution of the United States, which provides that "No State shall pass any law impairing the obligation of contracts."

11. Therefore, in accordance with section 237 (a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the case is one in which, under the legislation in force when the act of January 31, 1928, was passed, to wit, under section 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States on a writ of error, as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors filed herewith pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; [fol. 129] and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Therefore, your petitioner prays for the allowance of an appeal from the said Supreme Court of the State of Georgia, the highest court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the Supreme Court of the State of Georgia may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Georgia under his hand and the seal of said court, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made whereby this appeal may operate as a supersedeas and that the bond to be given by the petitioner for supersedeas and costs be approved.

This 15th day of July, 1946.

Carl H. Davis, Philip H. Alston, T. M. Cunningham,
Attorneys for Atlantic Coast Line Railroad Company.

[fol. 130] [File endorsement omitted.]

[fol. 131] IN THE SUPREME COURT OF THE UNITED STATES

(Title omitted)

ASSIGNMENTS OF ERROR—Filed July 15, 1946

Petitioner, Atlantic Coast Line Railroad Company, assigns the following errors in the record and proceedings in this cause; and alleges that the Supreme Court of Georgia erred as follows in holding that the net income received by Atlantic Coast Line Railroad Company, as lessee of the railroads of the Georgia Railroad and Banking Company, from the main line and Athens branch of the lessor, is taxable to Atlantic Coast Line Railroad Company under the income tax act of the State of Georgia of March 31, 1931, and amendments (Georgia Laws 1931, Ex. Session, p. 24, now codified in Code of Georgia, section 92-3102, et seq.).

1. The Supreme Court of Georgia erred in sustaining the validity of the said income tax act of March 31, 1931, as amended, under which the taxes in this case were assessed against Atlantic Coast Line Railroad Company, and in overruling the contention of Atlantic Coast Line Railroad Company, duly made in the pleadings in this case, that the said act of March 31, 1931, as so applied impaired the contract contained in section 15 of the charter of Georgia Railroad Company (Acts 1833, p. 256) the name of which was changed to Georgia Railroad and Banking Company (Acts 1835, p. 181), contrary to article I, section 10, paragraph I, of the constitution of the United States which provides that, "No State shall pass [fol. 132] any law impairing the obligation of contracts." There was thus drawn in question the validity of a statute of the State of Georgia on the ground of its being repugnant to the constitution of the United States, and the decision of the Supreme Court of the State of Georgia was in favor of the validity of said statute.

2. The Supreme Court of Georgia failed to decide that said section 15 of the charter of Georgia Railroad & Banking Company was an irrevocable contract, protected by the contract clause of the constitution of the United States, and that the said contract inured in this matter to the benefit of Atlantic Coast Line Railroad Company, the lessee of the lines of railroad of Georgia Railroad and Banking Company covered by said section 15 of the charter, but by-passed this question and erroneously construed the charter with the purpose and intent to avoid a decision on the question that the charter was an irrevocable contract with the State of Georgia.

3. The Supreme Court of Georgia erred in holding that the tax imposed by section 15 of the charter of Georgia Railroad and Banking Company is a property tax and that said section 15 constitutes no bar to the collection of the income tax under the 1931 income tax act from the net income derived by the lessee from the leased lines covered by the said charter tax limitation.

4. The decision of the Supreme Court of Georgia, that the tax imposed under section 15 of said charter is a property tax, is contrary to the decisions of the Supreme Court of the United States construing this charter in the

cases of Wright v. Georgia Railroad & Banking Company, 219 U. S. 420, and Wright v. Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, 236 U. S. 687; and the similar charters of South Western Railroad Company and Augusta and Savannah Railroad in the cases of Wright v. Central of Georgia Railway Company, 236 U. S. 674, and Central of Georgia [fol. 133] Railway Company v. Wright, 248 U. S. 525; 250 U. S. 519. The Supreme Court of the United States in said cases has construed this charter tax as a tax on income and has further held that under said charter a property tax could not be imposed and that no tax could be imposed except the tax of ½ of 1% on the net income of the charter lines.

5. The Supreme Court of Georgia is bound to follow the construction put on the charter by the Supreme Court of the United States, where the question involved, as here, is whether the act of the State legislature impairs the obligation of the charter contrary to the Federal constitution.

6. The thing taxed under section 15 of said charter is the net income of the lines of railroad covered by the charter tax limitation, whether the net income is earned from the operation of the railroads by the Georgia Railroad & Banking Company or by its lessees. The thing taxed is not the rental received by the lessor. This has been the invariable practice of one hundred years, and the decisions of both the Supreme Court of Georgia and the Supreme Court of the United States construing this charter, are to this effect. The Supreme Court of Georgia has so decided in the case at bar; but has erroneously applied this fact as upholding its construction of the charter, that the charter tax is a property tax, whereas this fact destroys the holding of the Supreme Court of Georgia that the charter tax is a property tax. The Supreme Court of Georgia erred in not holding that section 15 of the charter, taken in connection with the provisions of the charter conferring the power to lease, contemplates that a tax of ½ of 1% should be the maximum tax imposed on the net earnings from the operations of the railroads covered by section 15 of the charter; and that when so taxed the power of the State to tax either the lessor or the lessees is exhausted.

7. The Supreme Court of Georgia erred in not holding that the tax provisions of section 15 of the charter inured to the lessees and that the taxation to the lessees of the [fol. 134] net income of the lines of railroad covered by said section 15 at the rate of 5½% under the said income tax act of March 31, 1931, impaired the obligation of the contract, contrary to the contract clause of the Federal constitution, the same income having been already taxed ½ of 1% under section 15 of the charter.

8. The Supreme Court of Georgia erred in ignoring and in not following the decisions of the Supreme Court of the United States in the case of Wright, Comptroller General, v. Central of Georgia Railway Company, 248 U. S. 525, and 250 U. S. 519. In these two cases the Supreme Court of the United States held that it impaired the contracts contained in the charters of the South Western Railroad Company and the Augusta and Savannah Railroad to tax Central of Georgia Railway Company, the lessee of these railroads, on its leasehold interest. The charters of these two lessor railroads contain substantially similar provisions as to taxation as does the Georgia Railroad and Banking Company charter. This decision is applicable to the Georgia Railroad and Banking Company and is in no wise distinguishable. The contention of appellant was that as the leasehold interest of Atlantic Coast Line Railroad Company could not under the authority of this decision, be taxed to it without impairing the obligation of the contract contained in section 15 of the Georgia Railroad charter, a fortiori, the income from the leasehold interest could not be taxed without impairing the obligation of section 15 of the charter. The Supreme Court of Georgia did not merely overlook these decisions of the Supreme Court because they were pointedly called to its attention both in the briefs and on the oral argument.

9. The Supreme Court of Georgia erred in resting its decision of the case at bar on the decision of the Supreme Court of the United States in Hale v. State Board, 302 U. S. 95. The errors in this are as follows:

[fol. 135] (a) In the Hale case the statutes of Iowa exempted from taxation certain bonds issued by the State and its subdivisions. The State of Iowa subsequently taxed

the interest on the bonds under an income tax act. The Supreme Court of Iowa held that as there was no income tax act in existence when the bonds were issued, it construed the exemption as not covering a tax on income, and the Supreme Court of the United States followed the decision of the Iowa court. In the case at bar, section 15 of the charter of the Georgia Railroad imposes a tax on income, eo nominee, and limits it to ½ of 1%, so that there is no room for the construction, which the Supreme Court of Georgia puts on the charter, that the charter permits a tax on income of 5½% under the income tax act of 1931.

(b) The Supreme Court of the United States followed the construction of the Supreme Court of Iowa, which it was not bound to do; but in the case at bar the Supreme Court of Georgia does not follow the construction of the Supreme Court of the United States of the Georgia Railroad charter which it is bound to do.

10. In seeking to bring the case at bar within the orbit of the Hale case, the Supreme Court of Georgia states in its opinion that at the time the Georgia Railroad charter was granted in 1833 there was no general law providing for income taxes. Until the constitution of 1868 there was no provision as to uniformity of taxation. When this charter was passed, railroads were a new species of property. Most of the railroads which were chartered between 1833 and January 1, 1863 (when the Code went into effect which prohibited perpetual charter exemptions) contained the provision for a tax on net income at ½ of 1%. By 1858, when several railroads were finally constructed, the legislature passed an act taxing all railroads one-half of 1% on their net annual income (Act 1858, section 8, p. 104) and [fol. 136] this policy was continued in several successive acts. (Act December 14, 1861, p. 80, section 5; Acts 1868, p. 143; Act October 5, 1868, section 3, p. 154; Act March 18, 1869, p. 160; Act January 10, 1872, section 3, p. 276; Act February 20, 1873, p. 65; Act February 26, 1874, section 3, p. 103). This species of property continued to be taxed on the income basis until February 28, 1874 (Acts 1874, p. 107) when all tax exemptions of railroads were repealed and it was provided that they should all be taxed on the ad valorem basis, which latter act brought on all the litigation which ensued over these special charters. The legislature of Georgia, when it passed the act of 1833, must

be presumed to have known the difference between a property tax and an income tax, and it must be presumed that it deliberately chose to tax the net income, whether made by the lessor or lessee, and not the property on the ad valorem basis.

11. The Supreme Court of Georgia erred in not holding that irrespective of whether the tax imposed under section 15 of the charter of the Georgia Railroad & Banking Company was a property tax or an income tax, that the taxation to Atlantic Coast Line Railroad Company of the net income received by it from the operation as lessee of the lines of the Georgia Railroad & Banking Company covered by section 15 of the charter at the rate of 5½% under the income tax act of March 31, 1931, when the same income had been taxed at the rate of ½ of 1% under section 15 of the charter of the Georgia Railroad and Banking Company, impaired the obligation of the charter contrary to the contract clause of the constitution of the United States. Whether the tax levied under section 15 of the charter is defined as a property tax or an income tax, the net income from the operation of the lines of railroad covered by section 15 of the charter, is the thing on which the tax is levied, and it makes no difference whether the income is earned by [fol. 137] the lessor or the lessee, as the Supreme Court of the United States has distinctly held that the tax provision of the charter inures to the lessee; moreover, when the tax of ½ of 1% is imposed on the net earnings under the charter a higher tax cannot be imposed on the net earnings on either the lessor of the lessee without impairing the obligation of the contract, contrary to the aforesaid contract clause of the constitution of the United States.

Wherefore, on account of the errors hereinbefore assigned, petitioner prays that the said judgment of the Supreme Court of the State of Georgia dated June 6, 1946, in the above entitled cause be reversed and judgment rendered in favor of this appellant.

This 15th day of July, 1946.

Carl H. Davis, Philip H. Alston, T. M. Cunningham,
Attorneys for Appellant.

[fol. 138] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL AND FIXING SUPERSEDEAS AND COST BOND—Filed July 15, 1946.

The petition of Atlantic Coast Line Railroad Company, appellant in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Georgia, having been filed with the clerk of this court and presented herein, accompanied by assignments of error, and the statement as to the jurisdiction of the Supreme Court of the United States as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby:

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final judgment dated the 6th of June, 1946, of the Supreme Court of Georgia, as prayed in said petition, and that the clerk of the Supreme Court of the State of Georgia shall within 40 days from this date make and transmit to the Supreme Court of the United States under his hand and the seal of the said court, a true copy of the material parts of the record herein, which shall be designated by praecipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further ordered that the said appellant [fol. 139] shall give a good and sufficient supersedeas and cost bond in the sum of $5,000, that said appellant shall prosecute said appeal to effect and answer all damages and costs if it fails to make its plea good, and that said supersedeas bond when filed and approved, shall stay the sending down of the mandate herein and of all proceedings in this cause until the final disposition of this cause by the Supreme Court of the United States.

This 15th day of July, 1946.

R. C. Bell, Chief Justice of the Supreme Court of the State of Georgia.

[File endorsement omitted.]

[fols. 140-148] Supersedeas and Cost Bond on appeal for $5,000.00 approved and filed July 15, 1946, omitted in printing.

[fols. 149-151] Citation in usual form, filed July 15, 1946, omitted in printing.

[fol. 152] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed July 15, 1946

And now comes Atlantic Coast Line Railroad Company, appellant in the above stated case, and designates the following portion of the record in said case to be incorporated into the transcript to be sent to the Supreme Court of the United States.

1. Notice November 15, 1944, of adjustment of its tax liability sent to Atlantic Coast Line Railroad Company by Department of Revenue, omitting statement attached thereto.

2. Protest of Atlantic Coast Line Railroad Company dated December 11, 1944, omitting formal parts and omitting oath attached.

3. Notice dated March 5, 1945, from Department of Revenue to Atlantic Coast Line Railroad Company denying its protesting petition.

4. Notice dated March 5, 1945, from Department of Revenue to Atlantic Coast Line Railroad Company of assessment of deficiency in income taxes for the years 1941, 1942, and 1943.

5. Appeal of Atlantic Coast Line Railroad Company to superior court of Chatham County from above assessment.

6. Bond for costs on the above appeal.

7. Agreement of Atlantic Coast Line Railroad Company to pay all taxes for which it has admitted liability.

[fol. 153] 8. Order substituting M. E. Thompson, Gam-

missioner of Revenue of State of Georgia, as appellee in place of J. Eugene Cook.

9. Amendment of Appeal filed by Atlantic Coast Line Railroad Company, and allowance thereof.

10. Special plea of M. E. Thompson, State Revenue Commissioner.

11. Opinion and order of court dated January 25, 1946, sustaining the appeal.

12. Further order dated February 2, 1946, on opinion of January 25, 1946.

13. Motion for new trial of M. E. Thompson, State Revenue Commissioner, and order of court denying said motion.

14. The following portions of the brief of evidence:

(a) Oral evidence of H. E. Judge.

(b) Agreed statement of facts, omitting exhibits 2, 3, 4, 5, 6, 7 and 8, attached thereto, but not omitting recitals as to these exhibits contained in said agreed statement of facts.

(c) Three affidavits of F. B. Pope.

(d) Proposed adjustment by Department of Revenue dated August 30, 1945, of income tax liability of Augusta and Savannah Railroad for the years 1942 and 1943, with Schedule 1 attached.

(e) Proposed adjustment by Department of Revenue dated August 30, 1945, of income taxes of Georgia Railroad & Banking Company for years 1942 and 1943, with schedule 1 attached.

(f) Proposed adjustment by Department of Revenue dated August 30, 1945, of income taxes of South Western Railroad Company for years 1942 and 1943, together with the attachments thereto, including letter of September 18, 1945, correcting amount of return.

[fol. 154] (g) Letter from Department of Revenue dated August 28, 1945, to South Western Railroad Company as to making ad valorem tax returns for the year 1939, through 1945.

(h) Letter to Augusta and Savannah Railroad and also letter to Georgia Railroad and Banking Company identical to the letter of August 28, 1945, to South Western Railroad Company.

(i) Extract from the agreed statement of facts in the case of William A. Wright, Comptroller General of the

State of Georgia, petitioner, against Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, which follows page 45 of the photostatic copy of the transcript of record in said case in the Supreme Court of the United States.

(j) Extract from Valuation Docket No. 312 of Interstate Commerce Commission reported in 125 ICC Reports, page 551, the particular extract being on page 592.

15. Bill of exceptions taken by M. E. Thompson, State Revenue Commissioner of the State of Georgia, from the decision of the superior court of Chatham County to the Supreme Court of Georgia.

16. Opinion of the Supreme Court of Georgia rendered in this case.

17. Judgment of the Supreme Court of Georgia rendered in this case June 6, 1946.

18. Petition for appeal.

19. Statement as to jurisdiction of the Supreme Court of the United States.

20. Order allowing appeal and fixing supersedeas and cost bond.

21. Supersedeas and cost bond.

22. Assignment of errors.

23. Notice to Attorney for Appellee, directing [fol. 155] his attention to the provisions of paragraph 3 of Supreme Court Rule 12.

24. Citation.

25. Praecipe.

26. Acknowledgment of service by appellee of documents designated above Nos. 18 to 25.

27. Clerk's certificate.

This 15th day of July, 1946.

Carl H. Davis, Philip H. Alston, T. M. Cunningham, Attorneys for Atlantic Coast Line Railroad Company.

[File endorsement omitted.]

[fol. 155-A-178] **The following parts of the record were specified by the Appellee**

[fol. 179] W. A. WRIGHT ET AL.

v.

GEORGIA RAILROAD & BANKING CO.

No. ——

WILLIAM A. WRIGHT, THE COUNTY OF WILKES, AND THE COUNTY OF TALIAFERRO, APPELLANTS,

VERSUS

GEORGIA RAILROAD AND BANKING COMPANY, APPELLEES.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

—Transcript of the Record—

Solicitors for Appellants:

John C. Hart (Atlanta, Georgia), Attorney General of the State of Georgia.
Samuel H. Sibley, (Union Point, Ga.).
Hooper Alexander, (Atlanta, Georgia).
Ligon Johnson, (Atlanta, Georgia).

Solicitors for Appellees:

Joseph B. Cumming, (Augusta, Georgia).
Alex C. King, (Atlanta, Georgia).

ORIGINAL BILL

United States of America, Northern District of Georgia:

To the Honorable the Judges of the Circuit Court of the United States for the Northern District of Georgia:

The Georgia Railroad and Banking Company, which avers itself to be a corporation created and existing under the laws of the State of Georgia with its principal office in the City of Augusta in said State, hereinafter styled Orator, brings this its bill of complaint against William A. Wright, a citizen of the State of Georgia, resident in the Northern District thereof, in the City of Atlanta, and thereupon your Orator complains and says—

(1) That the several parties, plaintiff and defendant, are citizens and residents as hereinbefore stated.

[fol. 180] (2) That the matter in controversy exceeds, exclusive of interest and cost, the sum or amount of $2,000, and arises under the constitution of the United States.

(3) Your Orator shows that on the 21st day of December, 1831, the legislature of the State of Georgia passed an act incorporating your Orator under the name of "The Georgia Railroad Company." Thereafter, to wit on the 18th day of December, 1835, said legislature passed another act, by the first section of which the name of your Orator was changed to "The Georgia Railroad and Banking Company."

(4) By said first mentioned act provision was made for the construction of a "Union Railroad" or "Middle Road" and three branch railroads, from the terminus of the Union Road or Middle Road—one running to Athens, one to Eatonton, and one to Madison—all of said named towns being in the State of Georgia.

(5) It was enacted in the 15th section of the said first mentioned act that "the stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them; and after that shall be subject to a tax not exceeding one half per cent per annum on the net proceeds of their investments."

(6) Your Orator shows that thereafter, to wit, December 25, 1837, said legislature passed another act by which your Orator should have the right to extend its railroad from the town of Madison to "connect with and join the railroad (then) about to be constructed by the State from Tennessee line, near the Tennessee River to the southern bank of the Chattahoochee River." Said act provided that for that purpose your Orator should "have all the powers and privileges, rights and immunities in the construction of said branch from Madison, as aforesaid, to the said State railroad, as are contained in the [fol. 181] several acts heretofore passed and of force, constituting the charter" of your Orator.

(7) Your Orator shows that thereafter, to wit, January 21, 1852, said legislature passed an act, authorizing and empowering your Orator and the Washington Rail or Plank Road Company to "consolidate their stock, and providing that the two companies aforesaid after the consolidation of their stock should be known as one corporate body, under the name and style of The Georgia Railroad and Banking Company and that said corporate body should be authorized to exercise all the powers and privileges conferred by existing laws upon the Georgia Railroad and Banking Company, and be under all the liabilities and restrictions imposed on the same."

(8) Your Orator shows that all of the aforesaid acts of the legislature are public laws of the State of Georgia.

(9) Your Orator shows that under said acts of the legislature of Georgia, your Orator constructed and equipped a main railroad from the City of Augusta to the City of Atlanta, a branch railroad from Union Point to the City of Athens and a branch railroad from a station on its main line known as Barnett, to the town of Washington. All said localities are in the State of Georgia. The length of said railroads is respectively: Main railroad 171 miles; Athens branch 40 miles; Washington branch 18 miles; total 229 miles.

10. Your Orator shows that the stock of the said company and its branches now consist of and is invested in said railroads set forth in paragraph (9) hereof, with their franchises, and their rolling stock equipment, depots, freight houses, section houses, tools, and other property connected with the said railroads of Orator, except to the amount of $44,000 which is the proceeds of stock issued under an act of the General Assembly of 1868; and that the same and every part thereof are their investments, from which the net earnings are to be and are derived, one half of one per centum of which is to measure and fix the amount of taxes to be [fol. 182] levied on and collected out of said railroads and other property, with their appurtenant and integral franchises.

Said railroads were constructed and equipped by the outlay of money, subscribed for said enterprises amounting to Four Million One Hundred and fifty six thousand

($4,156,000). Said sum was subscribed and paid by the subscribers to your Orator and invested by your Orator under the terms hereinafter set forth in the 15th section of your Orator's original charter in said railroads, their equipment and appurtenances.

11. Your Orator shows that by said Fifteenth section of Orator's charter and Orator's action thereunder, a contract was created between the State of Georgia and your Orator, by which the State bound itself never to impose and levy a direct tax upon the property, in which said subscriptions were invested, but to receive in lieu of all taxes and burdens on said property one half of one per cent of the net earnings of said investments.

12. Your Orator shows that for sixty-three of the seventy years of your Orator's life—your Orator being absolutely exempt from every kind of tax during the first seven years—the State of Georgia has required of your Orator and your Orator has paid, taxes, upon the theory and practice of such a contract; and said practice of the State as to your Orator's taxes was never departed from until the passage of an act by the Legislature as hereinafter stated.

13. Your Orator shows that by the laws of the State of Georgia, railroad companies are required to make their annual returns for the purpose of taxation to the comptroller general of said State, not only for the purposes of State, but also for the purposes of county and municipal taxation. That in accordance with the laws of the State of Georgia requiring from railroad companies annual returns to the comptroller general of the State of all their taxable property, as modified by your Orator's [fol. 183] charter. Your Orator has made returns for taxation annually, said returns have been accepted and these taxes assessed thereon paid by your Orator and accepted by the State. These returns have shown (first) said railroad as hereinbefore described and its equipment, valued at Four Million two hundred thousand ($4,200,000) and (second) other property of your Orator. Said returns have claimed—and said claim has been allowed—that the said railroad and its equipment with its integral franchises were exempt from tax, except to the extent of one half of one per cent. on the net proceeds derived

therefrom, except so far as they were the product of Forty Four thousand ($44,000) Dollars invested under an amendment to your Orator's charter passed October 5, 1868—which said amendment did not exempt the investment made thereunder.

14. Your Orator shows that such a return as is described in the next preceding paragraph of this bill of complaint was made to the comptroller-general for the year 1903 as for former years. A copy of said return is hereunto annexed marked Exhibit A. But your Orator shows that defendant William A. Wright, who is the comptroller-general of the State, refused to receive said return and demanded of your Orator a different return, as hereinafter set forth.

15. Your Orator shows that on the 17th day of December, 1902, an act was passed by the General Assembly of Georgia, and approved by the Governor of said State, entitled "An act to provide for and require the payment of taxes on franchises, and to prescribe the method for the return and payment of said taxes," in and by which it was provided that the term "special franchise" as therein used, should include every right and privilege exercised within said State, granted to any person, partnership or corporation by said State, or its authority, or by any county, or county officer or officers, or any municipal corporation, or any officer thereof, for exer- [fol. 184] cising the power of eminent domain, or for the use of any public highway or street, and every special right granted for the exercise of any public service, such as the construction or operation of railroads, and likewise for the enjoyment of many other like privileges.

Every person, partnership or corporation, holding or owning and exercising any special franchise in the State of Georgia is required to make a special return to the said comptroller-general stating the value of said franchises as are exercised within said State, and particularly describing the same.

That by said act, said franchises are classed as and defined to be property and are required to be taxed at the same rate as other property.

16. Your Orator shows that on said demand of the comptroller general, your orator made a second return,

a copy of which is hereunto annexed, marked exhibit B. But your orator protested in making said second return, that no part of said railroad or its equipment—except as to $44,000 as aforesaid was subject to property taxation.

17. Your orator shows that your orator has offered, and continues to offer, to pay the amount of taxes assessable against it under its charter, to wit, one half of one per cent. of the net earnings of its investments. But the comptroller general refuses to accept such payment as a compliance by your orator with its legal obligation to pay taxes; but, on the contrary, claims: First that your orator should pay a direct tax on the value of its aforesaid railroad and equipment in excess of Four Million One Hundred and Fifty-six Thousand Dollars—and second, that your orator should pay a tax on your orator's franchises. Said second claim is made under said act of the legislature of Georgia approved December 17, 1902, entitled "An act to provide for and require the payment [fol. 185] of taxes on franchises, and to prescribe the method for the return and payment of said taxes."

(18) But your orator avers that it is not liable to said franchise tax or to any tax as to its said railroad and equipment, except a property tax on $44,000 and an income tax of one half of one per cent. on its net earnings.

(19) Your orator shows that its railroad property, the representative of the investment of its stock, has, as an inseparable and essential element constituting its chief value as the investment of its stock, the very franchise attempted to be thus separately taxed. That but for such franchise said property would be of little if any value, and of no value whatever as a railroad. That but for the element of value derived from the franchise, the capital stock could not have been raised, it would not have been invested in the railroad property above mentioned, and no income nor proceeds, net or gross, of any kind could be derived therefrom.

Your orator shows that an amount equal to one half of one per centum upon the net proceeds of the said railroad and their franchises, is, by its contract with the States under which said railroads and franchises with

their equipments were invested in by the said Company, fixed as the property tax to be levied on said railroads, franchises, and equipments, and that any pretended act of the legislature of Georgia assuming to levy any other sum upon any part or against any part of said property, including said franchises, impairs the obligation of the contract made by the State of Georgia with your orator by said section 15 of said act of 1833, and is contrary to the constitution of the United States.

(20) But your orator shows that nevertheless the said William A. Wright, who is comptroller-general of the State of Georgia, acting as such comptroller-general, insists that your orator shall pay to the State of Georgia, to fifteen counties of said State and numerous munici- [fol. 186] palities through which your orator's said railroad passes, a property tax on,—($1,990,756) Dollars, said sum representing the alleged excess in value of your orator's investments in its said railroad over and above the part of your orator's capital stock—the tax thus demanded being for the year 1903 $20,000 or other large sum.

(21) Your orator shows that said William A. Wright acting as comptroller general as aforesaid, claims that the franchises of your orator should be valued outside of, and in addition to, its property at a large but as yet indefinite sum, and that your orator shall pay taxes on said sum, when determined, to the State of Georgia, to fifteen counties of said State, and to numerous municipalities through which your orator's said railroad passes.

(22) Your orator shows that said comptroller-general is threatening and is about to proceed, to collect said illegal taxes by levy and sale of your orator's property.

(23) Your orator shows that said purpose and attempt to collect said taxes are illegal and void: Because the charter of your orator is a contract between your orator and the State of Georgia, and by said contract said State bound itself to exact no taxes from your orator on account of its investments in the railroad aforesaid, exceeding one-half of one per cent. of the net earnings of said investments and said taxes would be greatly in excess of one half of one per cent of said earnings: and said threatened action of said comptroller general and said act

of the legislature of Georgia of December 17, 1902, would impair the obligation of said contract, and are unconstitutional, null and void under paragraph 1 of article 10 of the amendments to the constitution of the United States.

(24) That the railroads of the State so valued are returned and their valuations are demanded by the Comptroller General at a higher value, proportioned to their market value, than is any other species of property in the State; that the taxing officers of said State require returns [fol. 187] of all other property to be made, and accept same at a percentage of real value far below the percentages required of your orator and other owners of railroads in said State of Georgia, and deny to your orator and other owners of railroads in this State, the equal protection of the laws, in violation of the fourteenth amendment of the constitution of the United States.

(25) Your orator shows that the laws of the State of Georgia, governing the returns of property for taxation, require such returns to be made at the fair market value of said property. That such valuation of railroads in their return is required of railroad companies in making such returns, and such returns thus made do, and of necessity must, include as one element of value, the value as property, and as a part of the railroad as a property, the "special franchises" as defined in said act of 1902 above named, possessed, used or exercised in building, owning or operating a railroad.

(26) That the demand of said comptroller-general that your orator should pay taxes upon its railroad and property, to wit, on the amount of four million, one hundred fifty-six thousand dollars thereof, as equal to one half of one per cent of the net proceeds of the earnings of said railroad and properties and upon the surplus of valuation of said railroad and other properties at the rate of tax levied by the State, and also should pay a tax upon the alleged valuation fixed upon its alleged franchises as a part of its property, is, if enforced the taxation by the said State of the property of your orator and of the same property twice, in this that the value of said railroads and other property upon which said taxes first herein mentioned are levied includes as a part and integral

element of said railroads and other property the franchises to own, operate, use and construct the same, including the franchise of eminent domain; that without the same, the said property would be of value only as so much material, and would not be of the value mentioned in said return exhibit B and that said valuation is not fixed upon [fol. 188] the basis of said railroad as so much material, but is fixed upon the same as an operating, going railroad, and includes therein, as an element and part of said property, *the said franchises so attempted to be separately* taxed; that the laws of said State require the return of railroads for taxation, not as so much material, but as going concerns, and includes in such valuations each and every one of the franchises so required to be specially returned by the aforesaid act, approved December 17, 1902; that if the said comptroller general is allowed to collect taxes on the said railroads and other property of your orator as specified in said return Exhibit B in accordance with the valuation therein fixed, and also to collect additional taxes upon the so-called special franchise of your orator, as described in said act of the General Assembly approved December 17, 1902, your orator will be paying taxes twice upon the same property, to wit, upon said franchises and their value; that such payment and demand will not only be contrary to the constitution of the State of Georgia, which provides that all taxation of property shall be *ad valorem* and uniform, but will also be in violation of the fourteenth amendment to the constitution of the United States, in that it will deny your orator the equal protection of the laws and compel it to pay taxes twice upon the same property, whereas the other taxpayers of said State are only required to pay taxes upon the same property once; that under the constitution of the State of Georgia, no classification of property for the purposes of taxation is permitted, but all property is divided into two classes—that which is exempt from taxation, said exempted property being specified in the constitution of said State, and property which is not exempt; and that the property of railroads, including their franchises, together with all other property not exempt, stands in one class, and unless taxed in the same manner and to the same extent only, the owners of said railroad [fol. 189] property and franchises are denied the equal protection of the laws.

(27) Your orator being remediless under the rules of the common law and unable to obtain any relief, except in a court of equity, to the end that the defendant William A. Wright may, if he can, answer the several charges hereinbefore made against him, but not under oath, waives discovery from said defendant and prays:

First, That it be adjudged that your orator is not liable for a property tax on its railroad aforesaid, or any tax on its franchises; and that the only tax for which your orator is liable is a tax to the State only, not to exceed one half of one per cent. of the net earnings of your orator's investments in its railroad.

Second, That the said William A. Wright, comptroller-general, be enjoined from issuing any execution or taking any step to collect any tax from your orator, other than one half of one per cent. of the net earnings of its investments, or any tax on your orator's franchises.

Third, That your orator may have all other and further relief that its case may require and equity can afford.

And your orator will ever pray, etc.

Jos. B. & Bryan Cumming, Complainant's Solicitors.

King, Spalding & Little, Of counsel.

(Here follows Exhibit A and Exhibit B, tax returns, marked pp. 10 and 11.)

[fol. 190] Wm. A. Wright, Comptroller General, etc., vs. Louisville & Nashville R. R. Co. et al.

ORIGINAL BILL.

Circuit Court of the United States for the Northern District of Georgia.

Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company

versus

William A. Wright.

To the Honorable the Judges of the Circuit Court of the United States for the Northern District of Georgia:

Louisville and Nashville Railroad Company which avers itself to be a corporation created and existing under the

laws of the State of Kentucky, and Atlantic Coast Line Railroad Company which avers itself to be a corporation created and existing under the laws of the State of Virginia, hereinafter styled orators, bring this their bill of complaint against William A. Wright, a citizen of the State of Georgia, resident in the northern district thereof, in the City of Atlanta, and thereupon your orators complain and say:

1. That the several parties plaintiffs and defendant are citizens and residents as hereinbefore stated; and that the matter in controversy exceeds, exclusive of interest and costs the sum or amount of two thousand dollars.

2. The Georgia Railroad and Banking Company is a corporation whose original charter was granted by the legislature of the State of Georgia, December 21, 1833, which original charter was thereafter amended by several acts of said legislature passed prior to January 1, 1863.

3. Under the original charter and said amendments, the Georgia Railroad and Banking Company constructed and equipped a railroad running from the City of Augusta to the City of Atlanta, and a branch railroad running from Union Point on the railroad just mentioned to the City of [fol. 191] Athens—all in the State of Georgia.

4. Under an act of said legislature approved January 21, 1852, the Georgia Railroad and Banking Company acquired a branch railroad, extending from Barnett on its main line to the City of Washington, a distance of eighteen miles—all in said State.

5. In the year 1879 the Georgia Railroad and Banking Company being so authorized by an act of said legislature, purchased at judicial sale the railroad known as The Macon and Augusta Railroad seventy-eight miles in length and extending from the Town of Warrenton to the City of Macon—both in said State—and became and continues to be the owner of said railroad, its franchises and appurtenances.

6. On the 7th day of May, 1881, the Georgia Railroad and Banking Company, under authority given it in the twelfth section of its original charter, leased, together with other property, all of the above described railroads with

their franchises and appurtenances to William M. Wadley and his assigns; and by various conveyances, contracts and judicial proceedings your orators have become and are in succession to the said William M. Wadley the lessees of said railroad property and are and have been for many years operating the same under said lease.

A copy of said lease is hereunto annexed marked exhibit A, and the usual leave of reference prayed:

7. Under fifteenth section of the charter of the Georgia Railroad and Banking Company the railroads described in paragraph 2 of this bill of complaint, to wit, the railroad from Augusta to Atlanta and the branch railroad from Union Point to Athens, their appurtenances and franchise are exempt from all taxation, whatsoever, except a tax of one half of one per cent. of the net earnings of said exempt railroads, which is payable to the State of [fol. 192] Georgia, and which has been continuously so paid by the Georgia Railroad and Banking Company for each and every year since the same became payable under the charter aforesaid down to and including the year 1909; and the proper return has been made by said company to the Comptroller General of the State for the payment, when they become due, of the taxes for the present year, 1910.

8. Notwithstanding the exemption of said property from taxation as aforesaid, the defendant William A. Wright, claiming to have authority so to do, as comptroller general of the State of Georgia, sought from the year 1903 until the 21st day of February, 1910, to compel the Georgia Railroad and Banking Company to pay taxes on said property to the State of Georgia, to the counties and municipal corporations and to various school districts on the lines of said railroads.

9. The Supreme Court of the United States having decided that the railroads aforesaid were exempt from a property tax including a so-called "franchise tax," and that the legislation of the State of Georgia, which sought to impose a tax thereon, was unconstitutional, null and void; nevertheless, the defendant having failed in his persistent effort to collect taxes from the owner of the property the Georgia Railroad and Banking Company, is now seeking to levy the same taxes on the same prop-

erty in the hands of the tenants of the owner, to wit, your orators as lessees and to force your orators to pay the same.

10. In pursuance of this purpose, said William A. Wright claiming authority so to do as comptroller general as aforesaid, did on the 18th day of May, 1910, demand of your orators a return to be made within twenty days of said railroads described in paragraphs 2 and 3 of this bill of complaint, with the appurtenances and franchises thereof, and of all property connected with or used in the operation of said railroads.

[fol. 193] 11. Your orators being advised (first) that under the law as construed by the Supreme Court of the United States, the railroads described in paragraph 2 of this bill were not subject to any property tax, whatever; and that (second) under the laws of Georgia the landlord, the owner of property, is liable for the taxes upon it and not the lessee of the property; and that there is no law in the State of Georgia for collecting from a tenant the taxes assessable to the tenant's landlord; and being also informed that the landlord, the Georgia Railroad and Banking Company, had returned the railroad for taxation, described in paragraph 3 of this bill (from Barnett to Washington) and stood ready to pay the taxes thereon on or before the day they should become payable. Your orators being so advised, failed and omitted to make the return demanded as aforesaid.

12. Your orators having failed as aforesaid to make the return demanded by the comptroller general, he, on the 26th day of July, 1910, proceeded to assess the railroads described in paragraphs 2 and 3 of the bill, their franchises, rolling stock and other personal property connected therewith, and stocks and bonds and other property at an aggregate valuation of about fourteen million dollars ($14,000,000.00). A copy of said assessment is hereunto annexed, marked exhibit B and the usual leave of reference prayed.

13. In furnishing your orators with a copy of said assessment, said William A. Wright, as comptroller general, notified your orators that if they were dissatisfied with the amount of the aforesaid assessment they could call for an arbitration of that question.

But your orators are advised that they cannot safely participate in such arbitration, as their doing so would be an implied admission that they were liable for taxes on the property so assessed, while on the contrary they [fol. 194] are advised that they are not so liable, and they absolutely deny such liability.

14. Your orators have no such right, title, interest or estate in the property assessed against your orators as aforesaid, as makes your orators liable for taxes thereon. All of said property is now and ever has been since its creation the sole property of your orators' lessor, the Georgia Railroad and Banking Company, which company alone is liable for such tax as may be lawfully imposed on said property. Your orators are merely the tenants of said property for a term of years, which may, by the happening of contingencies expressly stated in the instrument of lease, come to an end at any time prior to the expiration of the term limited in the lease.

15. Said lessor, the Georgia Railroad and Banking Company, has never parted with its right, title and estate in said property, or sought to do so. It has never sought to be absolved, as the owner of said railroads and their appurtenances of its obligations to the public as a common carrier of freight and passengers, or of any of its obligations to the State and the public as a railroad company. On the contrary, since the date of the aforesaid lease to William M. Wadley, just as prior to said lease, the Georgia Railroad and Banking Company has been and is constantly sued by passengers or their legal representatives and shippers and by persons who have been injured by the running of trains on its railroads, and in such cases, judgments for which it alone is liable have been rendered against it, and have been satisfied annually for thousands of dollars. It makes no difference in the legal status that in most cases the lessees indemnify the lessor against such judgments.

16. Not only has said The Georgia Railroad and Banking Company never divested itself of this property; not only has it never sought to evade its liability to the public [fol. 195] as the owner and the responsible operator of its railroads; it has also recognized its obligation to pay all lawful taxes imposed upon it as the owner of

said property. This status and this relation to the subject of taxation have been uniformly and continuously recognized and acted on by the State of Georgia until the actings and doings of the defendant as herein complained of. During the twenty-nine years of the lease preceding said acts and doings, the State has collected and sought to collect taxes on the leased property only from the lessor. For this very year, 1910, while defendant is proceeding to collect taxes from your orators on that part of the leased property described in exhibit B he has accepted from the lessor a return for taxation of a part of the leased property, and will in due time collect the taxes on that return. The property referred to is the Macon and Augusta Railroad, to which your orators hold the same relation that they hold to the property for which defendant is now seeking to exact taxes from your orators.

17. Your orators do not claim that the property covered by the charter of the Georgia Railroad and Banking Company, which has been assessed by the defendant as per exhibit B, is exempt from taxation. On the contrary, your orators aver that it is taxable, but in accordance with a special scheme of taxation enacted by the wisdom of the legislature, dealing at that date with the economic conditions and governmental problems of the day. It was never the purpose of the legislature to relieve that company from all taxation, but to encourage an untried enterprise of great benefit, if successful, to the State. In pursuance of that purpose the legislature devised a system of taxation for the enterprise which it desired to foster. The principle, therefore, that immunity from taxation granted to a corporation will not pass by a sale to another person of the corporation's property and franchises has no application in this case.

18. One of the uses which the Georgia Railroad and Banking Company was authorized to make of its rail- [fol. 196] roads (see section 12 of its charter) was "to rent or farm out all or any part of their exclusive right of transportation or conveyance." When in a subsequent section (see section 15) the special scheme of taxation applicable to this corporation was enacted, it was so enacted for the corporation which had been formed

and shaped up and endowed with certain faculties by the preceding sections; and no limitation was put on the conditions and circumstances under which that scheme of taxation should operate or should cease; and there was no limitation even that the one privilege should be annulled by the exercise of another privilege granted with equal clearness.

19. Defendant pretends that the special scheme of taxation provided by the legislature for the property of the Georgia Railroad and Banking Company was a "personal" privilege granted to said corporation, and was not a quality or condition annexed to the property itself.

[* * * * * * *]

Your orators deny this proposition and aver on the contrary that this scheme of taxation was intended to attach to "this pioneer railroad" and that under no contingency was this particular railroad to be subject to any other taxation than one measured by the amount of its net profits.

20. But even if the contention of defendant be correct that this scheme of taxation is "personal" to the Georgia Railroad and Banking Company, your orators aver that the establishment of that proposition does not make the leased property liable to taxation. For they say the property remains the property of the person to whom this personal privilege in relation to it was granted. That person has never divested itself of the title to it, nor sought to avoid, nor, if seeking so to do, could avoid any of its obligations to the State and to the public. The obligations which accompany this privilege are just as bind- [fol. 197] ing now as they were prior to the lease aforesaid. These obligations also are just as fully observed now as then. The Georgia Railroad and Banking Company has not been relieved, nor sought to be relieved, of a single one of its duties to the State and the public touching this property. It has continuously paid to the State the taxes payable under its charter and the State for the twenty-nine years during which the lease has been in force, has accepted those taxes. It is liable in law for the proper management of the property for the service of the public, although the agencies by which the service is rendered, are its lessees; and as has been hereinbefore

stated, it has continuously admitted its liability to the public for the conduct of its lessees by submitting to suits based on their conduct. In a word, the Georgia Railroad and Banking Company has done nothing or omitted nothing or permitted nothing which would in any way defeat or suspend the operation of the "personal" privilege, even if it were personal—which your orators deny.

21. Notwithstanding that defendant pretends that the property which he has assessed in accordance with Exhibit B of this bill of complaint has been so transferred by its owner, the Georgia Railroad and Banking Company, as to deprive it of the protection of the charter of that company; nevertheless, the defendant, as comptroller general of the State of Georgia, has required of said company and has received from it the return for taxation under the provisions of said charter. That is to say, under said charter the property is subject to a tax of one half of one per cent of its net earnings, and defendant has required and received a return for taxation accordingly for the same period, to wit, the year 1910, for which he has made the aforesaid assessment. So that defendant is on the one hand taxing property in the hands of the Georgia Railroad and Banking Company in the manner prescribed by its charter, and on the other hand is proposing to tax the same property for the same period in the hands of [fol. 198] your orators under the general tax laws of the State—thus double taxing the same property.

22. Under the law of Georgia "taxes are to be charged against the owner of property if known." There is no law or usage of said State by which the owner of property is passed over and the taxes on his property are charged to his renter, tenant, or lessee.

As a fact, which your orators here aver, taxes are never charged to such renter, tenant, or lessee, and if defendant carries out his purpose, which he has commenced by the assessment aforesaid, your orator will not only be made to pay an enormous sum of money in the shape of taxes unlawfully assessed, and collected, but will also be denied the equal protection of the laws, contrary to the fourteenth amendment of the constitution of the United States, and in violation of art. 1, sec. 1, par. 2 of the constitution of the State of Georgia, providing that "Protection to person

and property is the paramount duty of government and shall be impartial and complete;" and further in violation of art. 7, sec. 2, paragraph 1, of the constitution of the State of Georgia, that "All taxation shall be uniform upon the same class of subjects." And your orators do further aver that the assessment against them of taxes on property belonging to the Georgia Railroad and Banking Company and the proceedings to collect of your orators such taxes on such property of the Georgia Railroad and Banking Company is to take your orators' property without due process of law, in violation of the provisions of the fourteenth amendment to the constitution of the United States, providing that, "No State shall deprive any person of life, liberty, or property without due process of law."

23. Your orators aver that the defendant, William A. Wright, having made the unlawful assessment aforesaid as the first step in his purpose, will, unless restrained by the order of this Honorable Court, proceed further therein and will levy the unlawful tax aforesaid and collect the [fol. 199] same by the sale of the property of which your orators are entitled to the use and enjoyment for a term of years.

24. Your orators being remediless under the rules of the common law and unable to obtain relief except in a court of equity, to the end that the defendant, William A. Wright may, if he can, answer the several charges hereinbefore made against him, but not under oath, waive discovery from said defendant and pray:

First. That it be adjudged that your orators are not or either of them, chargeable with taxes or any part of them on the property included in the assessment aforesaid.

Second. That the said William A. Wright, comptroller general, be enjoined from proceeding further in charging your orators with the taxes aforesaid and especially from issuing any execution for the collection of the same.

Third. That your orators may have all other and further relief that their case may require and equity can afford.

To the end that your orators may obtain the relief to which they are justly entitled in the premises, they now

pray the Court to grant them due process by subpoena, directed to the said William A. Wright, the defendant hereinbefore named, requiring and commanding him to appear herein and answer, but not under oath, the same being expressly hereby waived, the several allegations in this, your orators' bill contained.

And your orators will ever pray, etc.

Jos. B. & Bryan Cumming, McDaniel, Alston & Black, Complainants' Attorneys.

[fol. 200] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

No. 1323 In Equity

LOUISVILLE & NASHVILLE RAILROAD COMPANY AND ATLANTIC COAST LINE RAILROAD COMPANY,

v.

WILLIAM A. WRIGHT, Comptroller General.

FINAL DECREE

This cause coming on to be heard for final decree; upon consideration of the pleadings therein and the agreed statement of facts, and after hearing argument of counsel, it is considered, adjudged and decreed as follows:

1. That the lease executed by the Georgia Railroad and Banking Company to William M. Wadley, exhibited to the bill of complaint in this cause, of which the complainants are assignees under said Wadley, created the relation of landlord and tenant between the parties thereto and did not vest in said lessees any estate, but only an usufruct, which is not subject to be taxed to said lessees, and that the property covered thereby, with its renewals, alterations and betterments made by the lessees is not subject to ad valorem taxation.

2. That the scheme of taxation provided by section 15 of the charter of the Georgia Railroad & Banking Company embraces the railroads of the said Georgia Railroad & Banking Company with their renewals, alterations and

betterments made by the lessees including the rolling stock and equipment thereof, and that the said property sought to be taxed (except as hereinafter excepted) is covered by the scheme of taxation of said section 15 of the charter aforesaid and is not subject to ad valorem taxation.

3. That the property known as Augusta Terminals and Athens extention and terminals is covered by said charter scheme of taxation and is not subject to ad valorem taxation.

[fols. 201-210] 4. That the Atlanta Joint Terminals are subject to ad valorem taxation.

5. That except as to said Atlanta Joint Terminals, decreed to be subject to ad valorem taxation, the comptroller general is enjoined from further enforcement of any proceeding to subject the property to ad valorem taxation. As to the assessment and the enforcement of collection against said Atlanta Joint Terminals an injunction is refused and denied.

In open court this 18th day of July, 1912.

Wm. T. Newman, U. S. Judge

Filed in Clerk's Office, July 18, 1912. O. C. Fuller, Clerk, By F. L. Beers, Deputy Clerk.

[fol. 211] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ADDITIONAL PORTIONS OF THE RECORD DESIRED TO BE INCLUDED BY APPELLEE—Filed July 24, 1946

And now comes M. E. Thompson, State Revenue Commissioner of the State of Georgia, appellee in the above stated case and designates the following portions of the record in said case to be incorporated into the transcript to be sent to the Supreme Court of the United States.

(1) The following portions of the brief of evidence:

(a) Original bill of Georgia Railroad and Banking Company vs. William A. Wright, beginning on page 105, omitting the exhibits.

(b) Original bill of L. and N. Railroad Company and Atlantic Coast Line Railroad Company, beginning on page 133 of the record, omitting exhibits.

(c) Decree of William T. Newman, United States Judge of the District Court of the Northern District of Georgia.

(2) Motions to dismiss or affirm judgment of the Supreme Court of Georgia and reasons why the United States Supreme Court should not assume jurisdiction of the case.

(3) Additional portions of record desired to be included by appellee.

(4) Acknowledgment of service by appellant of [fol. 212] documents designated above, numbered one and two.

Eugene Cook, Attorney General, C. E. Gregory, Jr., Asst. Attorney General, Claude Shaw, Asst. Attorney General, Victor Davidson, Asst. Attorney General, Attorneys for M. E. Thompson, State Revenue Commission.

[File endorsement omitted.]

[fol. 213] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ACKNOWLEDGMENT OF SERVICE—Filed July 24, 1946

Service is hereby acknowledged and copy received of:

(1) Designation of additional portions of record desired to be included by appellee.

(2) Motion to dismiss or affirm judgment of the Supreme Court of Georgia and reasons why the United States Supreme Court should not assume jurisdiction of the case.

(3) Acknowledgment of service.

This 24th day of July, 1946.

T. M. Cunningham, Carl H. Davis, Philip H. Alston, Attorneys for Atlantic Coast Line Railroad Company.

[File endorsement omitted.]

[fol. 214] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 215] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT BY APPELLANT OF POINTS RELIED ON AND DESIGNATION OF PARTS OF THE RECORD—Filed August 10, 1946.

AND NOW COMES Atlantic Coast Line Railroad Company, Appellant in the above stated case, and herewith files a definite statement of the points on which it intends to rely, and also a statement of the parts of the record which it thinks necessary for the consideration thereof, with acknowledgment of service by the adverse party.

Appellant's Statement of Points to be relied on

1. The Supreme Court of Georgia erred in sustaining the validity of the Income Tax Act of March 31, 1931, under which the taxes in this case were assessed against Appellant, over the contention of Appellant that the said Act as so applied impaired the contract contained in Section 15 of the Charter of Georgia Railroad and Banking Company, contrary to Article 1, Section 10, Paragraph 1, [fol. 216] of the Constitution of the United States which provides that "No State shall pass any law impairing the obligation of contracts."

2. Section 15 of the Charter of the Georgia Railroad and Banking Company is an irrevocable contract and is protected by Article 1, Section 10, Paragraph 1, of the Constitution of the United States from impairment by any subsequent legislation or subsequent provision of the Constitution of the State of Georgia. This question has been settled by both the Supreme Court of Georgia and the Supreme Court of the United States, and this Court has held:

(a) The word "stock" in Section 15 of the said Charter does not mean shares of stock in the hands of the stockholders but means the capital of the corporation.

(b) The words "net proceeds of their investments" means net income of the railroads covered by the charter tax limitation.

(c) The tax under Section 15 of the Charter is not imposed on the rentals received by the Lessor; it is imposed on the net income from the operation of the lines covered by said Section 15, and that has been the practice for more than 100 years.

(d) The only method of taxation under Section 15 of the Charter is a tax on the net income, limited to one-half of 1% thereof. This scheme of taxation of this pioneer railroad is exclusive of all other taxes whether on the property or the income.

3. The interpretation put by the Supreme Court of Georgia upon Section 15 of the Charter of Georgia Railroad and Banking Company is erroneous, and contrary to the interpretations put thereon by the Supreme Court of the United States. The interpretation by the Supreme Court of the United States of Section 15 of the Charter is binding upon the Supreme Court of Georgia on the [fol. 217] question whether or not the Charter is impaired by the subsequent legislation.

4. The tax provisions of Section 15 of the Charter of the Georgia Railroad and Banking Company inure to the Lessees as has been decided by this Court.

5. The case of *Central of Georgia Railway Co.* v. *Wright, Comptroller General*, 248 U. S. 525; 249 U. S. 590; 250 U. S. 519, is decisive of this case.

6. The Charter cannot be impaired by the device of defining the tax imposed by Section 15 of the Charter as a property tax, and then imposing on the Lessee a 5½% income tax. The impairment of the contract is the same in kind, extent and substance, whether the tax imposed by Section 15 is a property tax or an income tax. The contract is impaired if its value is diminished or if it is affected at all.

7. *Rochester Railroad Co.* v. *Rochester*, 205 U. S. 236, and kindred cases are held by this Court not to be applicable.

8. The case of *Hale* v. *State Board*, 302 U. S. 95, on which the Supreme Court of Georgia rests its judgment in this case, is inapplicable to the case at bar. Beginning with the Charter of the Georgia Railroad in 1833, the tax

is explicitly based on the net income and all railroads in Georgia down to 1874 were customarily taxed on one-half of 1% of their net incomes. The assumption by the Supreme Court of Georgia that because the Income Tax Act of 1931 was not in effect in Georgia in 1833, therefore income taxes were not known in Georgia when the Georgia Railroad was chartered, is erroneous.

[fol. 218] 9. The cases cited by the Supreme Court of Georgia in the next to the last paragraph of its opinion are each and all distinguishable from the case at bar and are inapplicable.

10. This case is a part of a studied purpose of the taxing authorities of the State of Georgia to avoid and evade the Charter tax limitation of the Charter of the Georgia Railroad and Banking Company, and of the South Western Railroad Company and Augusta and Savannah Rail Road, which latter two companies have charter tax limitations substantially similar to that of the Georgia Railroad and Banking Company.

Statement of Parts of the Record Necessary for the Consideration of the Points Relied On

All of the record as filed is necessary for the consideration of the points relied on except (1) bond for costs on the appeal to the Superior Court of Chatham County (Praecipe Item No. 6); (2) agreement of Atlantic Coast Line Railroad Company to pay all taxes for which it has admitted liability (Praecipe Item No. 7), and (3) power of attorney constituting S. S. Brewer attorney for surety company on supersedeas and cost bond.

This 6th day of August, 1946.

Atlantic Coast Line Railroad Company, By T. M. Cunningham, Carl H. Davis, Philip H. Alston, Blair Foster, Attorneys for Atlantic Coast Line Railroad Company.

[fol. 219] Service is hereby acknowledged and copy received of:

1. Appellant's Statement of Points upon which it intends to rely; and

2. Designation of the parts of the Record deemed necessary for consideration.

This 6th day of August, 1946.

/s/ Eugene Cook, Attorney General, Victor Davison, Claude Shaw, C. E. Gregory, Jr., Assts. Atty. General, Attorneys for M. E. Thompson, Appellee.

[fol. 219a] [File endorsement omitted.]

[fol. 220] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT BY APPELLEE DESIGNATING ADDITIONAL PARTS OF THE RECORD WHICH HE THINKS MATERIAL FOR THE CONSIDERATION OF THE POINTS RELIED ON BY APPELLANT—Filed Aug. 14, 1946.

And now comes M. E. Thompson, State Revenue Commissioner of the State of Georgia, Appellee in the above stated case and herewith files the statement of additional parts of the record which he thinks necessary for the consideration of the points relied on by Appellant, to wit:

(1) That portion of the Brief of Evidence described in the designation of "Additional Portions of Record Desired to be Included by Appellee", as follows:

(a) Original bill of Georgia Railroad and Banking Company vs. William A. Wright. (In case of Wright vs. Georgia Railroad and Banking Company, 216 U. S. 420.)

(b) Original bill of L and N Railroad Company and Atlantic Coast Line Railroad Company. (In case of Wright vs. L & N and Atlantic Coast Line Company, 236 U. S. 687.)

(c) Decree of William T. Newman, United States Judge of the District Court of the Northern District of Georgia.

Appellee attaches acknowledgment of service by the adverse party.

Eugene Cook, Attorney General, C. E. Gregory, Jr., Asst. Atty. General, Claude Shaw, Asst. Atty. General, Victor Davidson, Asst. Atty. General, Attorneys for M. E. Thompson, State Revenue Commissioner.

[fol. 221] Service is hereby acknowledged and copy received of:

(1) Designation of additional parts of the record which Appellee thinks material for the consideration of the points relied on by Appellant.

This 12th day of August, 1946.

T. M. Cunningham, Carl H. Davis, Philip H. Alston, Blair Foster, Attorneys for Atlantic Coast Line Railroad Company, Appellant.

[fol. 221a] [File endorsement omitted.]

[fol. 222] SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1946

No. 385

ORDER NOTING PROBABLE JURISDICTION—October 14, 1946

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: Enter Blair Foster, File No. 51,249, Georgia, Supreme Court, Term No. 385. Atlantic Coast Line Railroad Company, Appellant, vs. M. E. Thompson, State Revenue Commissioner of the State of Georgia. Filed August 10, 1946. Term No. 385 O.T. 1946.

FILE COPY

Office - Supreme Court, U. S.
FILED
AUG 10 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 385

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant,

vs.

M. E. THOMPSON, STATE REVENUE COMMISSIONER OF THE STATE OF GEORGIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

STATEMENT AS TO JURISDICTION

CARL H. DAVIS,
PHILIP H. ALSTON,
T. M. CUNNINGHAM,
Counsel for Appellant.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
State statute the validity of which is involved	2
Dates of the judgment and application for appeal	2
Nature of the case	4
Substantial nature of federal question	7
Cases believed to sustain the jurisdiction	8
Appendix-Opinion of the Supreme Court of Georgia	9

Table of Cases Cited

Board of Commissioners v. *Lucas*, 93 U. S. 108	8
Bryant v. *Zimmerman*, 278 U. S. 63	8
Chesapeake & P. T. Co. v. *Manning*, 186 U. S. 238	8
Clark, Receiver v. *Willard*, 292 U. S. 112	8
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282	7, 8
Hale v. *State Board*, 302 U. S. 101	8
Memphis Gas Co. v. *Beeler*, 315 U. S. 649	8
Moody v. *Moody*, 29 Ga. 519	5
Mower v. *Fletcher*, 114 U. S. 127	8
North Carolina R. R. Co. v. *Story*, 268 U. S. 288	8
Rio Grande Western Ry. Co. v. *Stringham*, 239 U. S. 44	8
Standard Oil Co. v. *Johnson*, 316 U. S. 481	7
Wabash R. R. Co. v. *Tourville*, 179 U. S. 322	8

Statutes Cited

Code of Georgia, Annotated:	
Section 6-501	4
Section 92-8432	2
Section 92-8446	4

Page

Constitution of the United States, Article I, Section 10, Par. 1 ..... 4, 5

Income Tax Act of the State of Georgia of March 31, 1931 (Ex. Sess. Acts 1931, p. 24; Acts 1937, pp. 109, 117; codified in Code of Georgia Ann. Section 92-3102 2

Judicial Code, Section 237(a) (28 U. S. C. A. 344), as amended by the Act of January 31, 1928 (45 Stat. 54, c. 14, Section 1, 28 U. S. C. A. 861(a)) 1, 2, 7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 385

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant,

vs.

M. E. THOMPSON, STATE REVENUE COMMISSIONER OF THE STATE OF GEORGIA,
Appellee

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

And now comes Atlantic Coast Line Railroad Company, the above stated appellant, and makes the following statement as to the jurisdiction of the Supreme Court to entertain the appeal in this cause:

1. The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States to entertain this appeal is Judicial Code section 237(a), the pertinent provisions of which are as follows:

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be

had . . . where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The act of January 31, 1928, (c) 14, section 1, 45 Stat. 54, provides: "The writ of error in cases, civil and criminal is abolished. All relief as heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

2. The statute of the State of Georgia, the validity of which is involved, is the income tax act of March 31, 1931, and its amendments, the material portion of which is as follows: "Every domestic corporation and every foreign corporation, shall pay annually an income tax equivalent to five and one-half per cent. of the net income from property owned or from business done in Georgia, as is defined in section 92-3113." (Ex. Sess. Acts 1931, p. 24; Acts 1937, pp. 109, 117; codified in Code of Georgia Ann. section 92-3102.)

3. The date of the judgment sought to be reviewed is June 6, 1946, and the date upon which the application for appeal was presented is July 15th, 1946.

4. J. Eugene Cook, State revenue commissioner of Georgia, assessed Atlantic Coast Line Railroad Company for a deficiency of income taxes under the said income tax act of March 31, 1931, as amended, in respect of the income derived by Atlantic Coast Line Railroad Company from the main line of the Georgia Railroad and the Athens branch. Atlantic Coast Line Railroad Company protested the assessment of the deficiency as allowed by Code section 92-8432 (Code of Georgia Ann.).

In the protest filed by the Atlantic Coast Line Railroad Company to the said assessment, protestant objected to the assessment as follows:

"Your petitioner contends that the income of the Georgia Railroad main line and Athens branch for the years 1941, 1942, and 1943, is tax exempt by virtue of the irrepealable contract in the charter of that railroad granted in 1833, and is not to be used in any manner in preparing the income tax return of your petitioner to the State of Georgia . . . to so use tax exempt income is to tax your petitioner as one of the joint lessees of the Georgia Railroad, on the income received by your petitioner from the operations of the main line and Athens branch of said railroad and imposes a burden of taxation upon said properties of the Georgia Railroad & Banking Company and the stockholders thereof, for a tax upon the income received by a lessee of said Georgia Railroad necessarily impairs the ability of the Georgia Railroad & Banking Company to lease the Georgia Railroad (as it is expressly permitted to do under the charter) and decreases the amount of rent which the Georgia Railroad & Banking Company may receive from said property. The purpose of the State of Georgia in granting said charter to the Georgia Railroad and Banking Company and inserting therein the provisions concerning taxation was to encourage that corporation to build and develop its railroad under the promise that it would receive and retain for itself all of the profits thereof subject only to the burden of the tax provided by its charter. The corporation was to build its road with the promise that its profits from said road would be burdened only by the tax provided in its charter. The charter of the corporation expressly granted to it the right to lease its railroad. Any tax imposed upon the profits received by the lessee neces-

sarily affects the profits that the corporation will receive from its railroad, and thereby imposes upon the corporation the burden of taxation not permitted by its charter. It is a violation of article I, section 10, cl. 1 of the constitution of the United States and of article I, section 3, paragraph 2 of the constitution of the State of Georgia to impose said tax, because the charter of the Georgia Railroad & Banking Company constitutes a contract and the imposition of the proposed tax on your petitioner will be a violation of the obligation of said contract, contrary to the said constitutional provisions. . . . Your petitioner further protests said proposed assessments for the reason that the commissioner declined to recognize petitioner's claims of tax immunity as contained in the charter granted by the State of Georgia to the Georgia Railroad & Banking Company by act approved December 21, 1833; your petitioner having acquired a one-half interest in the lease dated May 7, 1881, between Georgia Railroad & Banking Company and William M. Wadley, and having succeeded to his rights and is thereby vested with all the rights, powers, privileges, and immunities granted by the State of Georgia to the Georgia Railroad & Banking Company by said charter and by said company, in the lease to the said William M. Wadley."

5. The said protest of Atlantic Coast Line Railroad Company was disallowed and thereupon it appealed from the said assessment to the superior court of Chatham County, as allowed by Code section 92-8446 (Ann. Code of Georgia), its principal place of doing business in the State of Georgia being in the said county.

An appeal to the superior court is a *de novo* investigation. Code section 6-501 provides: "An appeal to the superior court is a de novo investigation. It brings up the whole record from the court below, and all competent

evidence shall be admissible on the trial thereof whether adduced on a former trial or not; either party is entitled to be heard on the whole merits of the case." See also, construing said section: *Moody* v. *Moody*, 29 Ga. 519, 520.

Atlantic Coast Line Railroad Company filed an amendment to its appeal on the call of the case, the first paragraph of which amendment is as follows: "Section 15 of the charter of Georgia Railroad and Banking Company, which provides for a tax 'not exceeding one-half per cent per annum on the net proceeds of their investments,' is an irrevocable and inviolable contract of the State of Georgia, and cannot be modified or changed by any subsequent legislative act of the State of Georgia, or any subsequent provision of the constitution of the State of Georgia; and the said income tax act of 1931, as applied by the State revenue commissioner so as to tax Atlantic Coast Line Railroad Company with the income of the main line of the Georgia Railroad from Augusta to Atlanta and the branch to Athens, which it receives as lessee of the Georgia Railroad, is unconstitutional, null and void, and contrary to article I, section X, paragraph I, of the constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts; and it is contrary to article I, section III, paragraph II, of the constitution of the State of Georgia which provides that no law impairing the obligation of contracts shall be passed, and the assessments made by the State revenue commissioner under said income tax act of 1931 are, therefore, null and void."

6. J. Eugene Cook, State revenue commissioner, having resigned, M. E. Thompson was appointed State revenue commissioner in his place, and was duly substituted as the appellee in this case.

7. The case was heard before Judge R. H. Humphrey (of the Middle Circuit) without a jury, who presided in the place of Judge David S. Atkinson (of the eastern circuit), in which Chatham County is located, who disqualified himself. Judge Humphrey decided that section 15 of the charter of the Georgia Railroad and Banking Company was an irrepealable contract with the State of Georgia, and that under the charter the income from the main line and Athens branch could not be taxed to the lessee, the Georgia Railroad and Banking Company having already paid the one-half of one per cent per annum on the net proceeds of their investments as prescribed by the charter, and the court thereupon ordered that the appeal of the Atlantic Coast Line Railroad Company should be sustained and the assessments were adjudged to be null and void.

8. M. E. Thompson, State revenue commissioner of the State of Georgia, thereupon made a motion for new trial, which was duly overruled by the court, and he thereupon sued out a bill of exceptions to the Supreme Court of Georgia. The Supreme Court of Georgia, as appears from a copy of its opinion hereto attached, upheld the validity of the income tax act of March 31, 1931, as applied by M. E. Thompson, State revenue commissioner to tax Atlantic Coast Line Railroad Company, over the contention of the Atlantic Railroad Company (which was pressed before the Supreme Court of Georgia) that said act so construed impaired the obligation of section 15 of the Georgia Railroad Company charter contrary to article 1, section 10, paragraph 1, of the constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts.

9. The judgment entered by the Supreme Court of Georgia in this cause on June 6, 1946, from which this appeal

is taken is as follows: "This case came before this court upon a writ of error from the superior court of Chatham County; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed because the court erred in refusing a new trial. Direction is hereby given that the trial court vacate its former judgment in favor of Atlantic Coast Line Railroad Company and enter a judgment denying the appeal of the said company and rendering judgment in favor of M. E. Thompson, State revenue commissioner, sustaining the tax assessments as made."

10. The constitutional question involved is substantial because if appellant is right, it cannot be taxed under the income tax act of March 31, 1931, on the income received by it as lessee of the main line and Athens branch of the Georgia Railroad, which tax for the years involved in this case (1941, 1942, and 1943) amounts to a large sum of money; nor can it be taxed thereon for subsequent years during the balance of the term of the lease.

11. The following statutes and cases are cited to sustain the jurisdiction of the Supreme Court of the United States to entertain this appeal.

(a) The appeal is sought under section 237(a) of the Judicial Code (28 U. S. C. A. section 344) as amended by act of January 31, 1928 (45 Stat. 54, c. 14, section 1; 28 U. S. C. A., section 861(a)).

(b) On the point that if the income tax act of March 31, 1931, as applied to appellant by appellee is held valid by the Supreme Court of Georgia against the contention of appellant, that said act so applied is repugnant to the constitution of the United States, appeal will lie to the Supreme Court of the United States, see the following cases: *Standard Oil Co.* v. *Johnson*, 316 U. S. 481; *Dahnke-Walker Mill-*

ing Co. v. *Bondurant*, 257 U. S. 282; *Memphis Gas Co.* v. *Beeler*, 315 U. S. 649; *Hale* v. *State Board*, 302 U. S. 101; *Bryant* v. *Zimmerman*, 278 U. S. 63.

(c) The judgment of the Supreme Court of the State of Georgia is final, because direction is given in said judgment to the lower court to enter a judgment denying and dismissing the appeal and sustaining the assessment made by the commissioner. This finally terminates the case and leaves no discretionary act to be done by the lower court. See on this point the following cases: *Mower* v. *Fletcher*, 114 U. S. 127; *Board of Commissioners* v. *Lucas*, 93 U. S. 108; *Wabash R. R. Co.* v. *Tourville*, 179 U. S. 322; *Chesapeake & P. T. Co.* v. *Manning*, 186 U. S. 238; *Rio Grande Western Ry. Co.* v. *Stringham*, 239 U. S. 44; *North Carolina R. R. Co.* v. *Story*, 268 U. S. 288; *Clark, Receiver*, v. *Willard*, 292 U. S. 112.

12. A copy of the decision of the Supreme Court of the State of Georgia in this case is hereto attached.

This 15th day of July, 1946.

CARL H. DAVIS,
PHILIP H. ALSTON,
T. M. CUNNINGHAM,
Attorneys for Atlantic Coast Line Railroad Company.

APPENDIX

No. 15480

SUPREME COURT OF GEORGIA

Decided June 6, 1946.

THOMPSON, State Revenue Commissioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY

By the Court:

1. Where a perpetual corporate charter granted by the legislature confers tax exemptions upon the corporation, the exemption is irrevocable. Accordingly, article 1, section 3, paragraph 3 of the constitution of 1945 (Ga. L. 1945, p. 8), purporting to revoke such charter provisions, is void and of no effect.

2. Where, as here, such charter provision limits the tax on the "stock" of the corporation to ½ of 1 per cent "on the net proceeds of their investments," it is a property tax and constitutes no bar to the collection by the State under the 1931 income tax law as amended (Ga. L. 1931, Ex. Sess., p. 24) of an income tax from a lessee of the corporation on its net income derived from the use of the corporate property on which the charter thus limits the property tax.

Atlantic Coast Line Railroad Company, in resistance to a tax assessment by the State revenue commissioner for income taxes for which the commissioner claimed that it was liable under the 1931 income tax statute as amended (Ga. L. 1931, Ex. Sess., p. 24) claimed that it was exempt from such tax assessment under an act of 1833 (Ga. L. 1833, p. 256), incorporating Georgia Railroad Company, which later by amendment to its charter became Georgia Railroad and Banking Company; and that the income against which the tax under the assessment is claimed was realized as a lessee in the operation of the railroad. The

assessment was appealed to the superior court and the case was submitted to the judge without the intervention of a jury.

The railroad filed a special plea of *res adjudicata*, alleging that the judgments in the cases of State of Georgia *v.* Georgia Railroad and Banking Co., 54 Ga. 424, and Wright *v.* Georgia Railroad and Banking Co., 216 U. S. 420, were *res adjudicata* in the present case. The State filed a special plea attacking the act of 1833 upon constitutional grounds. In this plea it was contended that section 15 of the act, which provides for the tax exemption of the stock of the corporation, was unconstitutional in so far as it applied to the claim of exemption of Atlantic Coast Line Railroad Company; and that it was in conflict with section 17, article 1, of the constitution of 1798, which declared, "nor shall any law or ordinance pass, containing any matter different from what is expressed in the title thereof." The plea further alleged that sections 13 and 14 of the act of 1835 amending the original charter, in so far as they attempted to convey any income tax exemption granted the original corporation of Georgia Railroad Company to Georgia Railroad and Banking Company, conflicted with the constitutions of 1798, 1877, and 1945, as containing matter foreign to that indicated in the caption of the act. It was further alleged that section 15 of the original charter was in conflict with section 22, article 1, of the constitution of 1798, which declared that the General Assembly shall have power to enact any law it deems necessary and proper for the good of the State which is not repugnant to the constitution. This attack is based upon the contention that the provision under attack is repugnant to the constitution because it is a grant of sovereignty and was not expressed in the title. Other constitutional attacks were set forth in the plea.

There was no conflict in the evidence on the material facts. It was shown that Georgia Railroad and Banking Company, on May 7, 1881, leased the railroad properties to William M. Wadley and his assigns for a term of 99 years, beginning April 1, 1881, for an annual rental of $600,000; and that by successive leases and assignments

Atlantic Coast Line Railroad Company became and is the lessee of a one-half interest in the railroad property. It has, at all times up to the present, made payments to the State of taxes on its stock on the basis provided in section 15 of its charter, by paying as there provided ½ of 1 per cent of net income realized from the operation of the railroad. In making these calculations and payments, the corporation took the net income of Atlantic Coast Line Railroad Company during each year it had operated, and calculated ½ of 1 per cent of such net income and paid that amount to the State. Atlantic Coast Line Railroad Company has at no time paid any property tax on its lease, nor has it paid any income tax on the net income realized from its operation of the railroad. It was stipulated that section 15 of the act of 1833, *supra*, if valid and applicable to this case, applied to the main line of Georgia Railroad and Banking Company from Augusta to Atlanta, Georgia, and to the branch line from Union Point to Athens. It was further stipulated that the State of Georgia had never before demanded that the lessees of the railroad should return the net income received from the operation of the main line and the Athens branch; and that similar assessments have been made against Louisville and Nashville Railroad Company, which owned the other half interest in the lease.

The trial court overruled the State's special plea questioning the constitutionality of section 15 of the original charter, and rendered judgment in favor of the railroad. The State revenue commissioner excepts to a judgment overruling his motion for new trial, and assigns error also on the judgment overruling his special plea raising the constitutional question.

Duckworth, Justice. (After stating the foregoing facts.)

1. There appears in the constitution of 1945 (article 1, section 3, paragraph 3) the following provision: "All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void." There are two specific and inescapable legal reasons why the provision of the new constitution just quoted does not

and can not alter or affect the existing rights of the Atlantic Coast Line Railroad Company involved in this case. The first of these solid legal reasons is that the quoted provision does not purport to be retroactive; and even if it was expressly made retroactive, it would nevertheless be completely ineffective in so far as the fixed and established rights of this party are here concerned. The second reason is that this State is powerless by legislative enactment or constitutional provision to nullify or impair in any respect whatever its existing contractual obligations. If the charter provisions referred to are invalid, there would be no need for this constitutional declaration. If they are valid, then this declaration is empty and without legal effect. Article 1, section 10, constitution of the United States; Wheeler *v.* Board of Trustees, 200 Ga. (37 S. E. 2d, 322). By such charter provisions the State became a party to a contract, and however great the financial losses resulting from such tax limitation may be, such loss is nothing compared to the integrity and the solemn duty of the State to discharge fully any and all contractual obligations which it legally assumed.

2. In the view that we take of this case, we find it unnecessary to pass upon the validity of section 15 of the charter, upon which the railroad relies. If it be conceded that the charter provision referred to is valid, that the legislative branch of the government had the legal power thus to surrender a part of the sovereignty of the State and thereby tie the hands of all future legislatures, in so far as legislating freely upon the question of taxation of this corporation, and if it be conceded that the constitutional inhibition against the inclusion, in the body of an act, of matter different from and foreign to the subject embraced in the caption did not render this act void—we come, after all, to the plain provision of the charter which is dealing with and is confined to the subject of a property tax, unrelated to the question we now have of the liability of the corporation for its share of an income tax under the existing laws of the State. The exact language of the charter upon which the railroad relies is as follows: "The stock of the said company, and its branches shall be exempt from taxation

for and during the term of seven years from and after the completion of the said railroads or any one of them; and atfer that, shall be subject to a tax not exceeding one half per cent per annum on the net proceeds of their investments."

The decisive question is, whether or not this charter provision refers to and embraces income taxes, or is limited strictly to a property tax. It cannot be denied that any and all tax exemptions must be strictly construed, and unless the language clearly grants the exemption, it is the duty of the court to rule in favor of the State and against the corporation. Here we have the very foundation of the exemption or limitation stated at the outset to have reference to "the stock of the said company and its branches." If the rule of construction of exemptions above referred to is to be given any meaning whatever, it compels a construction of this provision that limits it to the stock or property of the corporation. Had it been intended that the corporation as a legal entity should forever be free from any sort or form of taxation except the one-half of one percent as therein provided, it would have been a simple matter to have so provided and thus to have made clear such an intent. In failing to make clear such an intent, it is assumed that the legislature intended that the courts apply the rule of construction and restrict the exemption to the limits there stated, and never extend it by writing in something more. There should be no difficulty in seeing clearly that the reference to income was intended solely as a statement of a basis for the calculation of the property taxes there expressly referred to. The fact that the net income is made this basis, and the tax limited to one-half of one per cent of such income, in no wise renders the provision one for an income tax against the corporation. A number of railroad charters existing at the time or subsequently granted contained similar provisions for taxation, but there existed in this State at that time no general law providing for income taxes. It was almost a century thereafter before the legislature enacted our present income tax statute.

We are not unmindful of certain language of the Federal courts indicating that those courts regarded the tax re-

ferred to in this charter provision as an income tax. See Wright *v.* Georgia Railroad and Banking Co., 216 U. S. 420; Wright *v.* Louisville & Nashville Railroad, 236 U. S. 687; Georgia Railroad and Banking Co. *v.* Wright, 132 Fed. 912. In Wright *v.* Georgia Railroad and Banking Co., supra, at page 431 it is said: "That railroad is the product of the investment of the authorized capital, and is, as such, subject only to a tax based upon its 'net proceeds.' This plan of tax upon net earnings is quite consistent with any other form of taxation, and is absolutely independent of any question as to whether the property thus taxed only upon its profits should have a less or greater value than the capital invested." Again, at page 432, it is said: "If we are right in construing the tax as one upon net income as a substitute for a property tax, the franchise may no more be taxed than any other property appropriate to the operation of the road." It is obvious from the language of the Supreme Court just quoted that the only question then being considered by that court was whether or not the property of the railroad could be further taxed. There was not before the court, and indeed it may well be doubted if the court thought of whether or not the corporation could be subjected to a State income tax under a valid law of the State thereafter enacted. Although that court said that it construed the charter provision to constitute a substitute for a property tax, this does not alter the legal question now involved, for it makes no difference whether the charter provision dealt expressly and exclusively with a property tax or provided that an income tax of one half of one per cent might be collected as a substitute for a property tax. It was after all and nevertheless dealing with the subject of a property tax, and not with the subject of an income tax. We, therefore, hold that section 15 of the charter relates only to a property tax and has no bearing on the question of income taxes. The conduct of the corporation and of this lessee, as well as the State officials, points clearly to the fact that all of them interpreted this provision to relate solely to a property tax. This is shown by the fact that Georgia Railroad and Banking Company has throughout the period of this lease yearly paid taxes to the State. It arrived at the amount of taxes due by taking

one-half of one per cent of the net income, not its net income, but the net income of Atlantic Coast Line Railroad Company earned by the use of this property. If this tax was an income tax, as contended by the railroad, then the earner of that income would be the proper party to pay the tax. The net income used as a basis for the calculation of the amount of taxes was the net income of Atlantic Coast Line Railroad Company, in which Georgia Railroad and Banking Company had no interest whatever. Obviously, Georgia Railroad and Banking Company had no obligation to pay an income tax on income in which it had no interest whatever. It paid the taxes on its property in conformity with the provision of its charter, because it recognized its legal obligation for the payment of property taxes upon its own property, and not because it was due the State an income tax arising from income belonging entirely to this lessee.

Having decided that the charter refers to a property tax on the stock of the corporation, and that only, we move on to the further question of whether or not the charter is a bar to the collection of the income tax here sought, which tax is based upon a law enacted in 1931 as amended, Code, Ann. Supp., § 92-3102, as follows: "Every domestic corporation and every foreign corporation shall pay annually an income tax equivalent to five and one-half per cent of the net income from property owned or from business done in Georgia, as defined in section 92-3113; Provided, that the amount of the tax shall not be less than would be produced by applying a rate of two per cent to a base consisting of the entire net income, as defined in this Title, plus all salaries and other compensation paid to all elected and appointed officers, and to the stockholder owning in excess of five per cent of the issued capital stock of the corporation or a relative per centum of the capital stock of any other corporation owning or holding the capital stock of such corporation, and after deducting from such base $10,000 and the deficit, if any; such tax shall be assessed upon the base provided by this section which will produce the greater tax."

In Mayor &c. of Savannah *v.* Hartridge, 8 Ga. 23(1), this court recorded its definite opinion to the effect that there was a well-defined and marked distinction between a prop-

erty tax and an income tax or capitation tax. It was there stated: "Taxation, in reference to the subject-matter, is divided by writers on political economy, as well as the tax laws of all governments, into three classes—capitation, property, and income; and where one or more is treated of or acted upon, *the other is never intended.*" (Italics ours.) This declaration by the court of last resort of this State in the early years of its existence established the policy of our law as one refusing to mix or confuse the three types of taxes. It was a wise and safe guide then. It remains so today, and while that decision was rendered several years after the enactment of the charter here involved, it must be assumed that the legislature, when enacting this charter, was acquainted with the fact as there recited that, "writers on political economy, as well as the tax laws of all governments," thus divided the forms of taxation and adhered to the rule that, where one or more of the forms of taxation are treated or acted upon, "the other is never intended." It is further said in headnote 3 of the cited case that: "A charter, authorizing a municipal corporation to tax real and personal estate, does not, necessarily, confer the right to tax income." This principle, stated differently to apply to the present case, means that the charter here, limiting to ½ of 1 per cent, of the income tax that may be levied against the stock (personal or real estate), does not necessarily confer an exemption against an income tax. To the same effect, see Waring *v.* Mayor &c. of Savannah, 60 Ga. 93; Featherstone *v.* Norman, 170 Ga. 370 (153 S. E. 58). In Purnell *v.* Page, 133 N. C. 125, 129 (45 S. E. 534), it is said: "The tax levied on income is not a property tax, but is a percentage laid on the amount which a man receives, irrespective of whether he spends it, wastes it, or invests it."

Since the railroad here plants its resistance to the tax sought to be collected squarely upon the charter provision of its lessor, and the contention that to apply the income tax law would offend the contract clause of the Federal constitution, article 1, section 10 (Code, §1-134), which prohibits a State from enacting a law that impairs the obligation of a contract, the decisions of the United States Supreme Court on this question are controlling and must be followed by the Supreme Court of Georgia. Without here

entering upon an extended, and in so far as this case is concerned, useless discussion of the various decisions of that court in cases somewhat similar to the case now before us, we may rest our decision upon the decision of that court in Hale *v.* State Board, 302 U. S. 95. It will be observed that in arriving at the conclusion there the Supreme Court accepted previous decisions of the Supreme Court of Iowa defining different forms of taxation. There the State of Iowa sought to collect an income tax under an income tax statute from the holder of certain county school-district and other public bonds that were issued prior to the enactment of the income tax statute, and at the time of the issuance of the bonds there existed in that State general laws prohibiting taxation of such bonds. Both the Supreme Court of Iowa and the Supreme Court of the United States—while recognizing that the law providing for exemption from taxation amounted to a contract, and the case was decided on the basis of this assumption—held that collection of the income tax did not constitute an impairment of the contract in violation of the Federal constitution. The Supreme Court pointed out that the non-existence of an income tax law in the State at the time the legislature was enacting the law exempting the bonds from taxation showed that the legislature had no intention to include or refer to an income tax when enacting the exemption statute, and that, after all, the legislative intent was the controlling factor in a proper interpretation of the exemption statute. Such reasoning applies with compelling force in the present case. There existed in Georgia at the time this charter exemption was enacted no general law which would subject the corporation to the payment of an income tax. In the exemption clause it was expressly stated that the limitation there provided was upon the taxation of stock of the corporation, identical in this respect with the Iowa exemption law if a substitution of bonds for stock is made. Hence here, as the Supreme Court said with reference to that case, the legislature of Georgia, in enacting this exemption clause, did not intend to include an income tax. Such limitation or exemption was not necessary, because in the absence of the same no income tax, under the law as it then existed, would have been exacted of the corporation. The decisions of this

court above referred to commit this court to a construction of tax laws which excludes a tax not referred to in the specific system of taxation dealt with. This rule of construction, which was applied in the Iowa case above, will be followed and applied by this court. We are impressed by the language employed by the Supreme Court in the above case, at page 109, where it is said: "The court is now concerned with the meaning and effect of particular contracts of exemption to be read narrowly and strictly. There is no room at such time for the freer and broader methods that have been thought to be appropriate in the development of the doctrine of implied restraints." By that plain language the Supreme Court gave definite meaning and the proper effect to the universal rule of construction which requires tax exemption laws to be strictly construed with all doubtful meanings resolved in favor of the taxing authority and against the exemption. Such language evidences a practical and reasoned approach, rather than a theoretical and mechanical one. As a legalistic theory it might be urged that, where property is by law exempted from taxation, the full benefit of such exemption is not realized if the owner is required to pay a tax calculated upon the income he receives from the ownership and use of such property. But a practical construction and fair recognition of the extreme difference in the two methods of taxation expose the utter fallacy of such a theory. In the one case, the property would be subject to the payment of a tax irrespective of who was its owner in the absence of such exemption, while in the other case irrespective of the ownership of the property which constitutes the instrumentality with which an income is realized, and irrespective of the disposition of such income, the party receiving the income is required to pay a percentage thereof as an income tax chargeable against himself as the earner and not against the property. Bearing upon the question here decided and in harmony therewith, see Clyde *v.* Gilchrist, 262 U. S. 94; Mason Co. *v.* Tax Commission, 302 U. S. 186; Adams *v.* Saenger, 303 U. S. 59, 62; Rapid Transit Corp. *v.* New York, 303 U. S. 573; Adams Mfg. Co. *v.* Storen, 304 U. S. 307; Graves *v.* N. Y. ex rel. O'Keefe, 306 U. S. 466; U. S. Trust Co. *v.* Helvering, 307 U. S. 57.

In arriving at our decision, here holding a lessee of the railroad subject, under the income tax statute of the State, to the payment of the tax here claimed, we have not been unmindful of, but have given full consideration to, the previous decisions of this court and the Federal courts. We have not overlooked the fact that the Supreme Court in *Wright* v. *Georgia R. R. & Banking Co.*, 216 U. S. 420, affirmed a judgment of the lower court which enjoined the State officials from collecting or attempting to collect any taxes from Georgia Railroad and Banking Company except ½ of 1 per cent of its net income, as provided in section 15 of its charter. We do not regard that judgment as an obstacle to the collection of the present tax, for the reason that when it was rendered no income tax statute existed in Georgia, and, hence, the Federal court did not and could not have given consideration to the question of whether or not the corporation there, or as in the present case a remote lessee of the property, might be subjected to the payment of an income tax under the law now relied upon, enacted many years subsequently to that judgment. A careful reading of the opinion in that case reveals that, notwithstanding the fact that the court many times used expressions indicating that the charter provision involved referred to an income tax, yet each time the court ultimately asserted that the tax there provided for was either a tax upon the stock or was a tax agreed upon as a substitute for a property tax. It is obvious, therefore, that, whether it was a property tax or a substitute for a property tax, it was not a substitute for an income tax, nor was it intended as a bar to the collection of an income tax under a proper law. The indisputable facts sustain the revenue commissioner's claim. The law under which the income tax assessment was made is a valid law of this State, and there being no legal obstacle to the collection of the tax here claimed, a judgment in favor of the State revenue commissioner was demanded, and the court erred in rendering judgment in favor of Atlantic Coast Line Railroad Company.

Judgment reversed, with direction. Bell, C. J., Jenkins, P. J., Duckworth, Atkinson, and Wyatt, JJ., and Judges Gordon Knox and Carl E. Crow concur. Head and Candler, JJ., disqualified.

(6119)

IN THE

SUPREME COURT OF THE UNITED STATES

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant,

vs.

M. E. THOMPSON, STATE REVENUE
COMMISSIONER OF GEORGIA,
Appellee.

BRIEF FOR ATLANTIC COAST LINE RAILROAD COMPANY IN REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

CARL H. DAVIS

PHILIP H. ALSTON

T. M. CUNNINGHAM

Attorneys for Atlantic Coast Line Railroad Company.

August 6, 1946.

SUBJECT INDEX

		PAGE
	Preliminary	1
I.	Statement of the Case	2
II	Contentions of Appellant	4
III	History of litigation in Supreme Court of United States	6
IV	Net income of railroad and not rentals is thing taxed under the Charter, and this has been the invariable practice	10
V	The Charter tax is levied exclusively on net income. The property is exempt from taxation. The power of the State is exhausted when the tax of ½ of 1% is levied	11
VI	The contract inures to the Lessees	13
VII	It makes no difference whether the Charter tax is construed as a property tax or income tax, in either event the Charter is impaired if the net income from the Charter tax lines is taxed to either the Lessors or Lessees at 3½% under the Income Tax Act of 1931	18
VIII	The Charter tax is not a property tax, it is an income tax	19
IX	Rochester Ry. v. Rochester, 205 U. S. 236, and kindred cases, distinguished	23
X	The contract is impaired if its value is diminished or if it is affected at all	25
XI	The Supreme Court of Georgia did not follow the construction put by the Supreme Court of the United States on this and kindred charters	27

SUBJECT INDEX CON'T

		PAGE
XII	All railroads in Georgia habitually taxed ½ of 1% on their net income until the year 1874	29
XIII	The case of Hale v. State Board, 302 U.S. 95, distinguished	30
XIV	Other cases distinguished	32
XV	Conclusion	35
	Appendix, I	36

TABLE OF CASES

Page.

Adams v. Saenger, 303 U.S. 59 33
Adams Mfg. Co. v. Storen, 304 U.S. 307 32

Central of Ga. Ry. Co. v. Wright, 206 F. 107 ..... 7, 8
Central of Ga. Ry. Co. v. Wright,
248 U.S. 525 ..... 7, 9, 16, 17, 18, 24, 25
Central of Ga. Ry. Co. v. Wright, 249 U.S. 590 ..... 7, 9, 17
Central of Ga. Ry. Co. v. Wright, 250 U.S. 519 ..... 7, 9, 17, 18
Central R.R. & Bkg. Co. v. Georgia, 92 U.S. 655 7
Clyde v. Gilchrist, 262 U.S. 94 32
Cohn v. Graves, 300 U.S. 308 ..... 22, 33

Farrington v. Tennessee, 95 U.S. 679, 683 26
Featherstone v. Norman, 170 Ga. 370 21
Flint v. Stone-Tracy, 220 U.S. 108 22

Georgia v. Ga. R.R. & Bkg. Co., 54 Ga. 424 5
Georgia R.R. & Bkg. Co., v. Wright, 132 F. 912 ..... 7, 10, 11
Goldsmith v. Augusta & Savannah R.R., 62 Ga. 468 10
Graves v. O'Keefe, 306 U.S. 466 34

Hale v. State Board, 302 U.S. 95 ..... 6, 20, 30, 33
Helvering v. Bankline Oil Co., 303 U.S. 362 34
Home Ins. Co. v. N.Y., 134 U.S. 594 23

Jetton v. University of the South, 208 U.S. 489 ..... 23, 25

Louisville & Nashville R.R. Co., et al. v. Wright, 201 Fed. 1023 7
Louisville & Nashville R.R. Co., et al. v. Wright, 199 Fed. 454 7

Mason Co. v. Tax Com. of Washington, 302 U.S. 186 33
Morris Canal Co. v. Baird, 239 U.S. 126, 132 ..... 23, 24

New York Rapid Transit Corp. v. State of N.Y., 303 U.S. 573 34
Norfolk & W. Ry. Co. v. Boyle, 12 F. Supp. 522, 523 25

Pacific Co. v. Johnson, 285 U.S. 481 23
Provident Institution v. Mass., 6 Wall. 611 23

Rapid Transit Corp. v. N.Y., 303 U.S. 573 28
Rochester R.R. v. Rochester, 205 U.S. 236 ..... 6, 23

Savannah v. Hartridge, 8 Ga. 23 29
Society for Savings v. Corte, 6 Wall. 594 23
South Western R.R. Co. v. Ga., 92 U.S. 676 7
South Western R.R. Co. v. Wright, 116 U.S. 231 7

United States Trust Co. v. Helvering, 307 U.S. 57 34
Van Hoffman v. City of Quincy, 4 Wall. 535, 552, 553 26

Winter v. Jones, 10 Ga. 190 26
Wright v. Central of Ga. Ry. Co., 146 Ga. 406 ..... 7, 9, 17
Wright v. Central of Ga. Ry. Co., 236 U.S. 674 ..... 7, 8, 9, 15
Wright v. Georgia R.R. & Bkg. Co., 216 U.S. 420 ..... 7, 11, 21, 22, 32
Wright v. Louisville & Nashville R.R. Co., et al.,
236 U.S. 687 ..... 7, 14, 24
Wright v. Louisville & Nashville R.R. Co., et al.,
201 Fed. 1023 8

TABLE OF ACTS, CODE SECTIONS, RULES OF COURT AND REFERENCES TO CONSTITUTIONS

	Page
Acts 1833, p. 256 (Sec. 15 Charter of Georgia Railroad Company)	3
Acts 1833 Secs 12 & 14, p. 262, 263 (Lease powers of Georgia Railroad Company) Appendix 1	3
Acts 1835, p. 185 (Change of name to Georgia Railroad & Banking Company)	3
Act Feb. 28, 1874, p. 107 (Act repealing railroad tax exemptions)	6
Acts 1902, p. 37 (Franchise Tax Act)	32
Acts 1931, Ex. Sess. p. 94 / Act 1937 pp. 109, 117 — Income Tax Act March 31, 1931 as amended	4, 18, 23
Under the following Acts, all railroads were taxed ½ of 1% on their net income:	
Act Dec. 11, 1858, Sec. 8, p. 104 Act Dec. 14, 1861, Sec. 5, p. 80 Act 1868, p. 143 Act Oct. 5, 1863, Sec. 3, p. 154 Act Mch. 18, 1869, p. 160 Act Jan. 19, 1872, Sec. 3, p. 276 Act Feb. 20, 1873, p. 65 Act Feb. 26, 1874, Sec. 3, p. 103	6
Code of Georgia, Annotated, Secs. 92-2602, 2603 (Codification of Act of 1874, repealing railroad tax exemptions.)	7
Code of Georgia, Annotated Sec. 92-3102 (Income Tax Act of 1931 as Amended)	4
Rule 7, Par. 3 of Supreme Court of U.S.	2
Rule 7, Par. 4 of Supreme Court of U.S.	2
Rule 12, Par. 3 of Supreme Court of U.S.	1
U. S. Constitution Art. 1, Sec. 10 Par. 1 (Impairment of contract provision)	29
Constitution of State of Georgia 1798	29
Constitution of State of Georgia 1868	29

IN THE SUPREME COURT OF THE UNITED STATES

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant,

vs.

M. E. THOMPSON, STATE REVENUE COMMISSIONER OF GEORGIA,
Appellee.

BRIEF FOR APPELLANT IN REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

The motion to dismiss or affirm is made under Rule 12, Par. 3. The motion is really an abuse of the Rule. The Rule contemplates that, when the Appellee files with the Clerk of the Court possessed of the record, any matter or ground making against the jurisdiction of this Court asserted by the Appellant, under those circumstances the Appellee may also file a motion to dismiss or affirm. The statement of the Appellee does not disclose any matter or ground against the jurisdiction of this Court: The jurisdiction of this Court rests on the ground that the Supreme Court of Georgia has upheld the validity of a Georgia Statute, which Statute is attacked on the ground that it is repugnant to the Contract Clause of the Constitution of the United States. Appellee merely asserts that there was no contract. That is the question in the case. If, on hearing

the case, it should turn out that there was no contract, this would not affect the jurisdiction of the Court; it would merely result in the Appellant losing its case.

The motion to dismiss or affirm is predicated on the proposition "that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument" (Rule 7, Par. 4). The decision of the Supreme Court of Georgia demonstrates that the questions are not "unsubstantial". In order to reach its decision, the Supreme Court of Georgia, instead of following the interpretations which have heretofore been put by this Court on the Charter contract involved in this case, has worked out its own construction of the Charter contrary to the construction of this Charter by this Court. Furthermore, the decision of the Supreme Court of Georgia assumes that since this Court has construed the Charter, there has been a material change in the decisions of this Court applicable to the Charter.

In order to affirm the judgment of the Supreme Court of Georgia, this Court will have to completely reverse itself on its constructions of this Charter.

As under Rule 7 (3) Appellant must file its brief 20 days after service of Appellee's motion, and as the record has not been printed, the references herein are necessarily to the pages of the typewritten transcript of the record.

I

Statement of the Case.

Georgia Railroad and Banking Company leased its railroad properties to William M. Wadley in 1881 for 99 years at an annual rental of $600,000.00, and by

successive transfers Appellant and Louisville and Nashville Railroad Company eventually became the Lessees, each being the Lessee of a one-half interest in the leased property. (T.R. 61-68).

Section 15 of the Charter of Georgia Railroad Company (Acts 1833, p. 256), the name of which was changed to Georgia Railroad and Banking Company (Acts 1835, p. 181) provides:

> "The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them; and after that, shall be subject to a tax not exceeding one-half percent per annum on the net proceeds of their investments." (T.R. 59)

This Charter provision is applicable only to the main line of railroad from Augusta, Ga., to Atlanta, Ga., and the branch from Union Point, Ga., to Athens, Ga. (T. R. 60). This provision of the Charter is hereafter referred to as the "Charter tax limitation", and the lines of railroad covered by it are hereafter referred to as the "Charter tax lines".

The power to lease is conferred by Sections 12 and 14 of the Charter (Acts 1833, pp. 256, 262, 263), a copy of which sections are attached hereto (Appendix 1).

The State Revenue Commissioner (the predecessor of Appellee), assessed against Appellant deficiency income taxes for the years 1941, 1942, and 1943, aggregating, with interest, about $200,000, the deficiency being the amount of one-half of the net income from

the operation of the Charter tax lines, the assessment being at the rate of 5½% on this net income (T.R. 63, 64).

The tax is assessed under the Income Tax Act of March 31, 1931, and amendments (Acts 1931, Ex. Sess. p. 94; Acts 1937, pp. 109, 117), now codified in the Annotated Code of Georgia, Section 92-3102, the material portion of which is as follows:

> "Every domestic corporation and every foreign corporation, shall pay annually an income tax equivalent to five and one-half per cent. of the net income from the property owned or from business done in Georgia as is defined in Section 92-3113." (T.R. 63).

The tax of one-half of 1% under said Section 15 of the Charter has been returned and paid on that basis for more than 100 years. (T.R. 95).

II

Contentions of Appellant.

The contentions of Appellant are set forth in the assignments of errors (T.R. 131), but for the purposes of this brief all that need be stated are the following:

1. The Charter tax limitation of the Georgia Railroad and Banking Company is an irrevocable contract protected from impairment by subsequent legislation by the Contract provision of the Federal Constitution (Art. 1, Sec. 10, Par. 1). (This question has been so thoroughly settled by the decisions of this Court hereafter referred to that it is unnecessary to discuss the

question in this brief. This question has also been settled by the Supreme Court of Georgia in *State of Georgia* v. *Georgia Railroad & Banking Co.*, 54 Ga. 424).

2. The thing taxed under the Charter is not the rentals received by the Lessor, it is the net income from the operation of the Charter Tax Lines, and this has been the practice for more than 100 years.

3. The tax is levied exclusively on the net income. No ad valorem tax can be assessed and the net income cannot be taxed higher than ½ of 1%.

4. The tax provisions of the Charter of the Georgia Railroad and Banking Company inure to the Lessees, and the demise of the property does not open up the Charter so as to permit the State to tax the Lessees with that which it could not tax the Lessor, as has been decided by this Court.

5. The Charter cannot be impaired by the device of defining the Charter tax as a tax on property (as the Supreme Court of Georgia has done), and then imposing on the Lessee a 5½% income tax.

6. The impairment of the contract is the same in substance, kind and extent, whether the tax imposed under Section 15 of the Charter is defined as a property tax or an income tax.

7. The tax imposed by Section 15 of the Charter is an income tax and not a property tax.

8. Railroads in Georgia were habitually taxed ½ of 1% on their net income until 1874, whether they had a Charter contract or not.

9. Rochester Railroad v. Rochester, 205 U.S. 236, and kindred cases, are held by this Court not to be applicable.

10. Hale v. State Board, 302 U.S. 95 and other cases on which the Supreme Court of Georgia rests its decision are inapplicable.

III

The history of the previous litigation in the Supreme Court of the United States, construing the Charter of the Georgia Railroad, and kindred Charters.

Many railroads were chartered by the Legislature of Georgia (prior to the Code of January 1, 1868, which prohibited the grant of irrevocable charters) which had tax limitations of ½ of 1% on their net income. All of these Companies have passed out of existence except three—Georgia Railroad and Banking Company, Augusta and Savannah Railroad, and South Western Railroad Company, the railroads of the two latter being leased by Central of Georgia Railway Company.

All railroads in Georgia, whether they had Charter tax limitations or not, were commonly taxed at the rate of ½ of 1% on their net incomes,* until the Act of February 28, 1874, (Acts of 1874, p. 107), the title of which Act is "An Act to amend the tax laws of this State so far as the same relate to railroad companies, and to define the liabilities of such companies to taxation, and to repeal so much of the Charters of such companies, respectively, as may conflict with the

*Act Dec. 11, 1858, Sec. 8, p. 104; Act Dec. 14, 1861, Sec. [illegible] p. 80; Act 1868, p. 143; Act Oct. 5, 1863, Sec. 3, p. 154; Act March 15, 1869, p. 160; Act Jan. 19, 1872, Sec. 3, p. 276; Act February 20, 1873, p. 65; Act, Feb. 28, 1874, Sec. 3, p. 103.

provisions of this Act". This Act provides that the railroads should be taxed as other property of the people of the State, (Codified, except as to title, Code of Georgia Ann., Secs. 92-2602, 2603). This Act brought on all the litigation over these Georgia railroad Charters which subsequently ensued.

There have been several cases decided by the Supreme Court of the United States holding these Charters to be irrevocable contracts,[1] and there have been two cases construing the Charter of the Georgia Railroad and two cases construing the Charters of the Augusta and Savannah Railroad and the South Western Railroad, which are specially applicable here.[2]

In *Wright* v. *Georgia Railroad & Banking Company*, 216 U.S. 420, affirming 132 F. 912, the State of Georgia was trying to tax the Georgia Railroad with a franchise tax, and was also trying to tax the Railroad Company with the increased value of its property due to additions and betterments. The Court held in this case, that the attempted tax would violate the Charter of the Company, that its property was exempt from taxation, and that it was not subject to any form of taxation except the tax of ½ of 1% on the net income, and that this tax would exhaust the power of the State to tax.

The cases of *Wright* v. *Louisville & Nashville Railroad Co., et al.*, 236 U.S. 687, affirming 199 F. 454,

1 Central Railroad & Banking Co. v. Georgia, 92 U. S. 655; South Western Railroad Co. v. Georgia, 92 U. S. 676; South Western Railroad Co. v. Wright, 116 U. S. 231.

2 Wright v. Georgia Railroad & Banking Co., 216 U. S. 420, affirming 132 F. 912; Louisville & Nashville Railroad Co., et al. v. Wright, 236 U. S. 687, affirming 199 F. 454, and 201 F. 1023; Wright v. Central of Georgia Railway Co., 236 U. S. 674, affirming 206 F. 107; Central of Georgia Railway Company v. Wright, 248 U. S. 525, reversing 146 Ga. 406; re-hearing granted 249 U. S. 590; decision on Re-hearing 250 U.S. 519.

and 201 F. 1023, and *Wright* v. *Central of Georgia Railway Company*, 236 U.S. 674, affirming 206 F. 107, were companion cases. Central of Georgia Railway Company was the Lessee of Augusta and Savannah Railroad and South Western Railroad which had Charter tax limitations similar to that of the Georgia Railroad. The Lessors were not parties to these cases. The contention in both cases was that the Lessees had long term leases and were the virtual owners of the properties, in view of which the State attempted to tax the Lessees with the fee of the properties. In both cases the Supreme Court dwelt on the power to lease contained in the Georgia Charter and contained in the Augusta and Savannah Charter, and the Court held in the Central of Georgia case (p. 679) that "No change in the manner of tax exemption was expected to follow from the demise of the road, any more than it would have followed from the admission of another carrier to partial rights or of an individual to carry his own goods", and made the same observation in the Georgia Railroad Charter case (p. 689). These two cases did not turn on the Fourteenth Amendment. They held specifically that the Lessees were protected by the Charter and that the Charter inured to the Lessees; and that the Railroad already had been exhaustively taxed in the manner pointed out by the Charter, and the Charter contract prevented the fee from being taxed to the Lessees. In the motion to dismiss or affirm, attention is called to the decree rendered by Judge Newman in the United States Circuit Court, who held that the Georgia Railroad lease created merely the relation of landlord and tenant and did not vest in the Lessees any estate. The State contended that the leases did create estates in the Lessees, but the

Supreme Court of the United States brushed this question aside and decided the case without any relevancy to whether the lease was a mere usufruct or an estate.

These two cases involving the taxation of the fee to the Lessees were followed by the case of *Central of Georgia Railway Company* v. *Wright*, 248 U.S. 525, reversing 146 Ga. 406. The contention in this case was that the leasehold interest of the Central of Georgia Railway Company in the Augusta and Savannah Railroad and in South Western Railroad Company was property under the laws of Georgia, and was taxable as property. The Court decided in this case (p. 526) that the case "presents another attempt to accomplish, by a change in form, what in Wright v. Central of Georgia Railway Company, 236 U.S. 674, was held to be an unconstitutional result", and that the Lessee was protected by the Charter from being taxed with the leasehold interest, although the leasehold interest was property of the Lessee. A re-hearing was granted in this case, *Central of Georgia Railway Company* v. *Wright*, 249 U.S. 590, as to the charter tax under the Charter of the South Western Railroad. On the rehearing, *Central of Georgia Railway Company* v. *Wright*, 250 U.S. 519, the Court re-affirmed its decision in 248 U.S. 525 as to the South Western Railroad.

This case concluded any attempt on the part of the State to tax the Atlantic Coast Line Railroad Company and the Louisville & Nashville Railroad Company, as Lessees of the Georgia Railroad, with their leasehold interest, because the situation in the Georgia Railroad leases was exactly the same as the situation in the Augusta and Savannah and South Western Railroad Company leases. If the leasehold interest

was not taxable to the Lessees and if they were protected by the Charter from being taxed ad valorem on the leasehold interest, it follows, a fortiori, that they cannot be taxed 5½% on the income from the leasehold interest.

This case is a part of a studied purpose of the taxing authorities of the State of Georgia to avoid and evade the Charter tax limitations of the Charters of the Georgia Railroad and Banking Company, Augusta and Savannah Railroad and South Western Railroad Company. The State is now proposing to tax the Georgia Railroad and Banking Company, the Augusta & Savannah Railroad, and the South Western Railroad on their properties on the ad valorem basis, just as though the Charter tax limitations had never existed. (T.R. 93, 94). The State also proposes to tax the Georgia Railroad and Banking Company (T.R. 85), Augusta and Savannah Railroad (T.R. 82), and the South Western Railroad (T.R. 89), 5½% on their respective rentals, in addition to the Charter tax of ½ of 1% on the net income of the Charter tax lines.

IV

It has been the invariable practice for more than 100 years to tax the net income of the Charter tax Lines and not the rentals paid by the Lessee.

In *Goldsmith v. Augusta and Savannah Railroad*, 62 Ga. 468, it was held (p. 472) "the income contemplated by the Charter is not the annual rental, but the earnings of the road".

In *Georgia R.R. & Bkg. Co. v. Wright*, 132 Fed. 912, Judge Newman said "The State has for sixty years or more allowed the Company to return its net

earnings and pay a tax thereon of one-half of 1% without objection". See also evidence of H. E. Judge (T.R. 56, 57).

The point in this contention is that, under the Charter, the thing which is taxed is not the income of the Georgia Railroad, but the net income of the operations of the Charter tax lines. The scheme of the Charter as interpreted both by the Supreme Court of Georgia and by this Court is that the net income of the Charter tax lines should be taxed no matter who earned it, whether Lessor or Lessee, and that when this tax is paid, the power of the State to tax further or differently to either Lessor or Lessee is exhausted.

V

Under the Georgia Railroad Charter the tax is levied exclusively on the net income of the Charter tax lines. The property is exempt from taxation. When the tax of ½ of 1% is levied, the power of the State to tax further is exhausted.

In *Georgia Railroad & Bkg. Co.* v. *Wright*, 132 F. 912, Judge Newman held (p. 919): "It is clear that it was the intention of the Legislature to provide a full and complete system of taxation for this corporation, and that it embraces its whole liability for taxation."

In *Wright* v. *Georgia Railroad & Bkg. Co.*, 216 U.S. 420, which affirmed Judge Newman's decision in 132 F. 912, the Court held:

> (p. 426) "That the only mode of taxation stipulated for after the period of total exemption is a tax upon the net income of the company's property is seemingly the plain and obvious meaning of this contract. That this is the way

in which it has been read and interpreted by everybody who has had to do with the matter of taxation in an official way since 1845, when the railroad seems to have been finished, affords strong evidence that this construction accords with the intent of the charter."

(p. 430) "After all, the precise question is, whether the legislative purpose, as expressed, was that the railroad incorporated should pay no tax except one based upon net profits of operation, or was it the intention that a specific amount of capital only should be so relieved? Undoubtedly, the State did not intend that any other capital than that authorized and invested directly in this specific railroad should be immune. That is plain by the express limitation of the charter. But is there any contingency under which this particular railroad is to be subject to any other taxation than one measured by the amount of its net profits?"

(pp. 431, 432) "This plan of tax upon net earnings is quite inconsistent with any other form of taxation, and is absolutely independent of any question as to whether the property thus taxed only upon its profits should have a less or greater value than the capital invested. A tax upon earnings is a tax which at last covers and includes, unless double taxation is intended, all property necessarily held and used to make that income, including the enjoyment of its franchises. It is not to be presumed, in the light of the public policy of the time, that the State intended that this pioneer railroad should be subjected to any form of taxation of property which produced the taxable income * * * We are, therefore of opinion that this property is not subject to any other method of taxation than that of the special system stipulated for by the contract, and that the act of the Georgia Legis-

lature, in so far as it provides for an ad valorem tax upon any part of this invested capital of the Georgia Railroad and Banking Company, does impair the obligation of the contract."

(p. 432) "If we are right in construing the tax as one upon net income as a substitute for a property tax, the franchise may no more be taxed than any other property appropriate to the operation of the road. When the State gave up the right to levy and collect a property tax and to take in substitution a tax upon the annual net profit, it gave up the right to tax the franchise of the company as certainly as it gave up the right to tax its railroad."

(page 436) The Court, in referring to the tax limitation of the Charter, describes it as "the immunity from any other tax than one based upon a given per cent. of annual net profits".

VI

The Contract Inures to the Lessees.

The Charter is an umbrella over the Lessees as well as the Lessor. When the tax of one-half of one per cent is paid on the net income, the power of the State to tax is exhausted. We wish to emphasize the fact that the thing which is taxed is the net income yielded by the Charter tax lines, whether that income is made by the operations of the Lessor or Lessees.

The protection of the Lessee is necessary to make good that promised the Lessor. Manifestly if the Lessee is not protected by the Charter the Lessor's ability to rent its property is materially affected. If the State can tax the same net income which has already been

taxed under the Charter one-half of one per cent, another .5½% under the Income Tax Act that which is promised the Lessor is denied; although the 5½% tax may be paid by the Lessee, because the Lessee took the lease on the faith of the contract. The State cannot double tax without violating the Charter.

In *Wright* v. *Louisville & Nashville Railroad Co., et al.*, 236 U.S. 687, which involved the question whether the State could tax the Lessees with the fee of the property, the Court first called attention to the fact that the 12th Section of the Charter of the Georgia Railroad authorized it to rent the whole or any part of its property or to let vehicles of others pass over its railroad, and the Court then said (p. 689) "So that the State has covenanted that the Company's property shall be exempt from tax except upon its income *which it is authorized to make in any of those ways* (Italics ours) * * * For the reasons given in the other case (Wright v. Central of Ga. Ry. Co., 236 U.S. 674), we cannot believe that if the Company saw fit to gain 'the net proceeds of their investments' (to one-half of one percent of which their tax was limited), by letting the whole road instead of allowing others to introduce carriages, *the Statute silently opened the right to resume as against the Lessee all that had been removed as against the Lessor*" (Italics ours). And again at page 690 the Court said: "If the fee of the roads is taxable to no one while the liability of the Lessor to the above mentioned one-half of one per cent, remains, an attempt to collect a tax upon the fee from the plaintiffs is an attempt on the part of the State to tax the leased property which was completely beyond the reach of its taxing power except in so far as

permitted by the contract, the obligations of which could not be impaired without a violation of the contract clause of the Constitution of the United States."

In the companion case of *Wright v. Central of Georgia Railway Co.*, 236 U.S. 674, which involved the taxation of the fee of the Augusta and Savannah and South Western Railroads, to their Lessee, Central of Georgia Railway Company, the Court said (p. 679):

> "The foregoing view of Section 16 would lead us to believe that no change in the matter of tax exemption was expected to follow from the demise of the road, any more than it would have followed from the admission of another carrier to partial rights, or of an individual to carry his own goods. But that is only an introduction to further considerations. We cannot suppose that the Legislature meant either to practice a cunning deception or to make a futile grant. Therefore, we are unable to read the charter as making the exemption vain by reserving to the State an unlimited right to impose upon the Lessee all that it had renounced as against the lessor. For that was to give notice to the parties, if they were supposed to know the law, that the exemption would be lost if the income was earned in one of the contemplated ways—or, if they were supposed ignorant, was to invite them to a bargain that was to have an unexpected and disastrous result."

And again the Supreme Court held on pages 679 and 680:

> "We see no ground for believing that there has been any change in the attitude of the State toward the pioneer enterprises that it was en-

couraging a few years before. We still cannot suppose that it was inviting the lessors to lose the benefit of their exemption or the lessees to find themselves entrapped with a burden made possible only by accepting the invitation of the act * * * We construe those statutes as making the fee exempt from other taxation than that provided for, in favor as well of the lessee as of the lessor—the protection of the lessee being necessary in order to make good that promised to the lessor".

In *Central of Georgia Railway Company* v. *Wright*, 248 U.S. 525, in which the State attempted to tax Central of Georgia Railway Company with its leasehold interest in the Augusta and Savannah Railroad and the South Western Railroad Company, the Supreme Court said (h.n.1):

"The same reasons which lead this Court to decide that the tax exemptions in the special charters of the Augusta and Savannah and the South Western Railroads inured to the Central of Georgia Railway as their lessee and precluded taxing the latter upon the fee of the leased property (Wright v. Central of Georgia Ry. Co., 236 U.S. 674) invalidate an attempt to evade the charter contracts by a tax of the leasehold interests."

In the body of the opinion the Supreme Court referred to the fact that the previous case in 236 U.S. 674 was an attempt to tax the Lessees with the fee of the two leased lines. In the course of its opinion, the Court said, (p. 527):

"The taxes now attempted to be levied are upon the leasehold interests of the Lessee in the same roads and it is argued that, if the leases produce a profit in excess of the rental, the

value is required to be taxed by the Constitution of the State. But the Constitution was subsequent to the charters that created the exemption and must yield to them if they apply to the present attempt. We are of opinion that, although the decision in the former case necessarily was confined to the question before the court, the reasoning applies with equal force to that now before us. The cases of Rochester Ry Co. v. Rochester, 205 U.S. 236, and Jetton v. University of the South, 208 U.S. 489, were urged as opposed to the conclusion reached but were thought not to control in view of the exceptional facts and language that had to be considered, as was recognized in Morris Canal & Banking Co. v. Baird, 239 U.S. 126, 132. We must follow the precedent that was established after full discussion and with recognition of the difficulties involved."

A re-hearing was granted in *Central of Georgia Railway Co.* v. *Wright*, 249 U.S. 599, as to the South Western Railroad, and in *Central of Ga. Ry. Co.* v. *Wright*, 250 U.S. 519, the decision as to the South Western Railroad in 248 U.S. was re-affirmed.

The decision of the Supreme Court of Georgia in *Wright* v. *Central of Ga. Ry. Co.*, 146 Ga. 406, which was reversed in *Central of Georgia Ry. Co.* v. *Wright*, 248 U.S. 525, and 250 U.S. 519, set at rest the question that a leasehold interest under the law of Georgia was property in the hands of the Lessee, and under the Constituiton of the State of Georgia it was taxable to the Lessee. If the Charter is protection to the Lessee against taxing the Lessee with its separate property interests in its leasehold, then why is not the Charter a protection to taxing the Lessee 5½% on the income

from the Charter tax lines under the Income Tax Act of March 31, 1931? For the very same reason that the leasehold is protected by the Charter, the income derived from the Charter tax lines covered by the lease is, a fortiori, protected.

The leasing powers in the Georgia Railroad Charter are substantially similar to the leasing powers in the Augusta and Savannah Railroad Charter. The State of Georgia was concluded by the decision in 248 U.S. 525 from attempting to tax the leasehold interest of the Lessees of the Georgia Railroad, because precisely the same questions were involved. So that the cases in 248 U.S. 525 and 250 U.S. 519 are authority in this case, which was binding on the Supreme Court of the State of Georgia.

VII

It makes no difference whether the Charter Tax is construed as a Property Tax or as an Income Tax, in either event the Charter is impaired by taxing the net income from the Charter tax lines to the Lessor or the Lessees at 5½% under the Income Tax Act of 1931.

We have demonstrated that under the Charter the property is exempt from taxation, that the income under the Charter cannot be taxed higher than ½ of 1%, that the Charter inures to the Lessees, that the leasehold interest of the Lessees cannot be taxed to the Lessees without violating the Charter, and that all of these questions have been definitely decided by this Court. We maintain that it logically and necessarily follows that the net income from the Charter tax lines cannot be further taxed 5½% to the Lessees without violating the Charter.

Just why it should violate the Charter to tax the leasehold interest to the Lessees and not violate the Charter to tax to the Lessees the income from the leasehold is impossible to explain. It does not make any difference whether the tax levied under the Charter is defined as a property tax or an income tax, the impairment of the Charter is the same in substance, kind and extent.

We understand, of course, that a person can be taxed on his property and at the same time taxed on the income from the same property, and that although this may be double taxation, that it is legally permissible, because there is no statute or constitutional provision against double taxation. But here we are dealing with a contract. The State cannot tax the Georgia Railroad ½ of 1% under the Charter and then tax the Georgia Railroad 5½% in addition under the Income Tax Act of 1931. The Charter prohibits a tax *higher* than ½ of 1%.

If we are right in the proposition that the Charter tax provision inures to the Lessees (as has been decided by this Court), then it makes no difference whether the Charter tax is a property tax or an income tax, because the result is that the net income under the Charter, whether earned by the Lessor or the Lessees can not be taxed higher than ½ of 1%.

VIII

The Charter Tax is not a Property Tax. It is an Income Tax.

The Supreme Court of the State of Georgia in this case has defined the charter tax as a property tax and, having so defined it, it then asserts that an income tax was unknown in the State of Georgia at the time this

charter was granted in 1833 and therefore it was not the intention of the Legislature that the income from the charter tax lines should not be taxed. All this was to bring the case within the decision by the Supreme Court of the United States in *Hale* v. *State Board*, 302 U.S. 95, which we distinguish hereinafter.

But the charter lays the tax specifically on income. The charter in terms designates the tax an an income tax. Therefore, no room is left for the decision of the Supreme Court of Georgia that the charter tax is a property tax. Income may be derived from physical property, or from securities, or from individual effort, or it may be derived from the use of physical property. The income tax imposed by the Georgia Railroad charter contemplated that the Railroad would be worked by someone and that the net proceeds of its operation was the thing which the charter aimed to tax. The fact that the income is made from property does not make the tax thereon a property tax. When the charter of the Georgia Railroad was written, in referring to income, necessarily the income spoken of was the income of particular property. We have already pointed out the significance that the income which is taxed under this charter is not necessarily the income of the Georgia Railroad & Banking Company. This Court has decided that the income might be made by either the lessor or lessee and that the demise of the railroad did not effect the charter tax.

This Court has decided specifically that the property is exempt from tax and that the only tax which can be levied is ½ of 1% on the net income, and that this is the exclusive mode of taxation.

In the case of *Featherstone* v. *Norman*, 170 Ga. 370, the Court held that income was not property in the sense in which that term is used in the Constitution of the State, requiring all property to be taxed uniformly. The Court said (at p. 393): "So both the property from which the income comes, and the income itself, are subject to separate assessments for taxation. The two are separate and distinct things. The taxation of one is not the taxation of the other. The assertion that the tax on one is a tax on the other is a fanciful conceit to which we cannot agree." This quotation fits our case. We say it is a fanciful conceit to say that the charter tax of ½ of 1% is a property tax and not an income tax.

In *Wright* v. *Georgia Railroad & Banking Company*, 216 U.S. 420, this Court, after deciding explicitly that the property of the Georgia Railroad was exempt from taxation, and that the only method of taxation under the charter was a tax on net income, said (at p. 432): "If we are right in construing the tax as one upon net income as a substitute for a property tax, the franchise may no more be taxed than any other property appropriate to the operation of the road. When the State gave up the right to levy and collect a property tax and to take in substitute a tax upon the annual net profit, it gave up the right to tax the franchise of the Company as certainly as it gave up the right to tax its railroad."

If the Charter tax on income is a substitute for a property tax, then it clearly is not a property tax. It could not at the same time be a property tax and a substitute for a property tax. What this Court meant

when it said that the net income tax was a substitute for a property tax was that although property is generally taxed in this State, instead of taxing the property the Legislature elected to tax the income.

Income is itself property, but a tax on income is commonly defined as an income tax, although the income may be derived from the use or operation of property. "A tax upon earnings is a tax which at last covers and includes, unless double taxation is intended, all property necessarily held or used to make that income" (*Wright* v. *Georgia Railroad & Banking Co.*, 216 U.S. 420, 432). "A tax on the income from land is not a tax on the land itself" (*Cohn* v. *Graves*, 300 U.S. 308, h.n. 6).

It is argued that the Charter tax of ½ of 1% is a *measure* of the tax on the property, hence the tax is a property tax. It may be a tax levied in lieu of a property tax, but that does not make it a property tax. At the time this Charter was passed there was no constitutional provision requiring a property tax. The best evidence that this Charter tax is not a property tax is the decision of this Court holding that the increment of the market value of the property, due to additions and betterments and other causes, is not taxable under this Charter. (*Wright* v. *Georgia R.R. & Bkg. Co.*, 216 U.S. 420, 427-432).

There is a long line of cases decided by this Court which hold that a franchise or privilege tax may be *measured* by the entire income, although some of the income is derived from taxable property, as, for instance, *Flint* v. *Stone Tracy Co.*, 220 U.S. 108; *Society*

for Savings v. *Corte*, 6 Wall. 594; *Provident Institution* v. *Mass.*, 6 Wall. 611; *Home Ins. Co.*, v. *New York*, 134 U.S., 594; *Pacific Co.* v. *Johnson*, 285 U.S. 481.

But the Income Tax Act of March 31, 1931, under which the State Revenue Commission is proceeding is not a franchise or a privilege tax. It is a direct tax on the income of all persons. Under this Act, the net income is not the measure of the tax, the net income is the thing taxed.

IX

Rochester Railway v. Rochester, 205 U. S. 236, and kindred cases, distinguished.

There is no transfer or assignment of the property in this case; it is merely a case of lease authorized by the Charter.

The Supreme Court of the United States has held in the cases hereinbefore cited, that under the peculiar provisions of these Georgia Charters granting tax limitations, the demise of the railroads to the lessees did not affect the charter limitations, and that they inured to the lessees, and in its opinions distinguished the cases of:

Rochester Ry. v. *Rochester*, 205 U.S. 236.

Jetton v. *University of the South*, 208 U.S. 439.

Morris Canal Co. v. *Baird*, 239 U.S. 126.

The Rochester case and the Morris Canal Company case both decided that the grant of immunity from taxation was personal to the owner of the property to whom the immunity was granted, and the immunity

could not be transferred. The Supreme Court in *Wright v. Louisville & Nashville R.R. et. al.*, 236 U.S. 687, 690, (which involved the taxation of the Georgia Railroad to the Lessees), said:

> "Thus the particular features of the case in hand take it without the rule applied in Rochester Railway v. Rochester, 205 U.S. 236, and other kindred cases, from which we have no purpose to depart."

In *Central of Georgia Railway Company v. Wright*, 248 U.S. 525, 526 (which was a case which involved taxing the leasehold interests of the Central in the Augusta and Savannah and the South Western Railroads), the Court said:

> "The cases of Rochester Ry. Co. v Rochester, 205 U.S. 236, and Jetton v. University of the South, 208 U.S. 489, were urged as opposed to the conclusion reached but were thought not to control in view of the exceptional facts and language that had to be considered, as was recognized in Morris Canal & Banking Co. v. Baird, 239 U.S. 126, 132."

In *Morris Canal Co. v. Baird*, 239 U.S. 126, 132, the Court said, after citing the case of *Rochester Ry. Co. v. Rochester*, 205 U.S. 236:

> "The results in Wright v. Central of Georgia Ry., 236 U.S. 674, and Wright v. Louisville & Nashville R.R. Co., 236 U.S. 687, 690, were based upon the original charters, which were interpreted as contemplating and permitting subsequent transfers without subjecting the fee to taxation. Neither of these cases modifies the

principles announced and applied in the opinion quoted from above—it is referred to with approval in the latter of them."

The fact that the Supreme Court of the United States in the case in 248 U.S. 525 held that the case of *Jetton* v. *University of the South*, 208 U.S. 489, was not controlling, is significant. In the University of the South case, the exemption from taxation was "as long as said lands belong to said University". The University leased the lands and it was held that the leasehold interest was taxable to the Lessee as property separate and distinct from the fee of the University, which was still protected by the Charter exemption. In the case at bar, as in the case of Central of Georgia Railway Company, decided in 248 U.S. 525, the tax limitation protected the Lessee as well as the Company which owned the railroad, because all interest in the property was taxed when the Charter rate was paid on the net income, the power of the State being exhausted.

X

The Contract is impaired if its value is diminished or if it is affected at all.

"One of the tests that a contract has been impaired is that its value has by legislation been diminished. The applicable section of the Constitution of the United States provides that the contract shall not be impaired at all. It is not a question of degree; manner, or cause, but one of whether the subsequent legislation of the state encroaches in any respect on the obligation of the contract or dispenses with any part of its force."

Norfolk & W. Ry. Co. v. *Boyle*, 12 F. Supp. 522, 523.

"The amount of the impairment of the obligation is immaterial. If there be any, it is sufficient to bring into activity the constitutional provision and the judicial power of this Court to redress the wrong."

Farrington v. *Tennessee*, 95 U.S. 679, 683.

"The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden. In Green v. Biddle (8 Wheaton 84), it was said: 'The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its term by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation."

Van Hoffman v. *City of Quincy*, 4 Wall, 535, 552, 553.

"The objection to a law, on the ground that it impairs the obligation of a contract, does not depend upon the extent of the change which the law may make in it." (h.n.2).

"Any deviation from its terms, by imposing conditions not expressed in the contract, however minute, and apparently immaterial in their effect, is within this constitutional prohibition." (h.n.3).

Winter v. *Jones*, 10 Ga. 190.

XI

The Supreme Court of Georgia did not follow the construction put by the Supreme Court of the United States on this and kindred charters.

The decisions of the Supreme Court of the United States construing a contract to determine whether subsequent legislation is violative of its provisions in view of the Contract Clause of the Federal Constitution are controlling on the Supreme Court of Georgia. No one doubts this proposition. The Supreme Court of the United States leans to accept the construction of such a charter by the State Courts unless the construction of the State Court is manifestly wrong. But when the Supreme Court has construed such a contract, the Supreme Court of the State is not at liberty to put a different construction on the contract. But that is just what the Supreme Court of Georgia has done in this case. The Supreme Court of Georgia says in its decision (T. R. 116): "We are not unmindful of certain language of the Federal Courts indicating that those courts regarded the tax referred to in this charter provision as an income tax". And then the Supreme Court of Georgia in utter disregard of the plain specific decisions of the Supreme Court of the United States proceeds to construe the contract contrary to the decisions of the Supreme Court of the United States.

The construction of the charter tax as a property tax is definitely contrary to the constructions put on this charter by the Supreme Court of the United States. If the Supreme Court of Georgia had followed the construction put on this charter and the kindred charters of the Augusta & Savannah and the South Western Railroads, the Supreme Court of Georgia could

not logically uphold the income tax assessment in this case. But the Supreme Court of Georgia in order to bring the case within the orbit of Hale vs. State Board, Supra., defined the charter tax as a property tax and then finds that as income taxes were unknown to Georgia when this charter was passed in 1833, that there is no charter obstruction to the assessment on the lessee of the 5½% income tax under the Act of 1931. We hereafter challenge the finding that income taxes were unknown in the State of Georgia when this charter was granted.

The decisions of this Court on the power of the Court to construe a contract to determine whether subsequent legislation violates the contract clause of the Federal Constitution is epitomized in the following decision:

> "This Court, in construing a contract to determine whether or not legislation is violative of its provisions within the meaning of the contract clause of the Constitution, will examine for itself the existence and meaning of the contract as well as the relation of the parties and the circumstances of its execution. Appleby v. City of New York, 271 U.S. 364, 379-380; Funkhouser v. Preston Co., 290 U.S. 163, 167; Violet Trapping Co. v. Grace, 297 U.S. 119, 120. But of course in doing so we 'lean toward agreement with the courts of the state, and accept their judgments as to such matters unless manifestly wrong', Hale v. State Board, 302 U.S. 95, 101; Tampa Water Works Co. v. Tampa, 199 U.S. 241, 243-244; Southern Wisconsin Ry. Co. v. Madison, 240 U.S. 457, 461."

Rapid Transit Corp. v. *New York*, 303 U.S. 578.

XII

Income taxes were not unknown in the State of Georgia when this Charter was passed. All railroads were habitually taxed one-half of 1% on their net income until the year 1874.

The Supreme Court of Georgia in its decision (T.R. 116) states "A number of railroad charters existing at the time or subsequently granted, contained similar provisions for taxation, but there existed in this State at that time no general law providing for income taxes. It was almost a century thereafter before the Legislature enacted our present income tax statute". It is true that there was no general law providing for income taxes in Georgia in 1833. The Constitution of Georgia of 1798 was the Constitution in effect when this Charter was passed. There was no provision in this Constitution or any subsequent Constitution of the State of Georgia until 1868 as to uniformity of taxation. Nor was there any requirement that property should be taxed ad valorem or in any other particular manner. When the Georgia Railroad Charter was passed, the tax imposed was an income tax. Therefore, it is preposterous to argue that income taxes were unknown in the State of Georgia at this time, or that the Legislature did not know what it was doing when it imposed an income tax rather than a property tax. As stated in the decisions of the Supreme Court, there were a number of railroads chartered by the State of Georgia which had charter limitations of one-half of 1% on net income. There were a number of other railroads chartered which had no tax limitations. The decision of the Supreme Court of Georgia (T.R. 118), refers to the decision of Mayor, etc. of Savannah v. Hartridge, 8 Ga. 23, which draws a distinction between

income taxes and property taxes. This case arose in 1849. The Supreme Court says in connection with this case in 8 Ga. 23 (T.R. 119) "* * * while that decision was rendered several years after the enactment of the Charter here involved, it must be assumed that the Legislature, when enacting this Charter, was acquainted with the fact as there recited that 'writers on political economy as well as the tax laws of all governments' thus divided the forms of taxation and adhered to the rule that where one or more forms of taxation are treated or acted upon the other was never intended." So that according to the decision of the Supreme Court of Georgia, the Legislature did know the distinction between income taxes and property taxes, and knowing the distinction it advisedly imposed an income tax under the Georgia Railroad Charter.

As early as 1858 and down to 1874, all railroads in Georgia, whether they had charter tax limitations or not, were commonly taxed at the rate of ½ of 1% on their net incomes (see the Statutes collected in a footnote on page 6 of this brief).

But we maintain, as elsewhere set forth in this brief, that it makes no difference whether the Charter tax was an income tax or a property tax, an additional tax under this Charter cannot be imposed either on the Lessor or the Lessees.

XIII

The case of Hale v. State Board, 302 U.S. 95, distinguished

This is the case on which the Supreme Court mainly rests its decision. It is wholly unlike the case at bar.

In the Hale case, under the Statutes of Iowa certain bonds were exempt from taxation and the Court

assumed that the Statutes constituted a contract. The Supreme Court of Iowa construing these Statutes held that the bonds were exempt, but that the income on the bonds was not exempt because at the time the Statutes were passed there was no general income tax law in Iowa. The Supreme Court of the United States elected to follow the decision of the Supreme Court of Iowa, although it was not bound to do so. The same argument cannot be made in the case at bar, because under the Georgia Railroad Charter the tax is specifically an income tax and the Supreme Court of the United States has held that under the Georgia Railroad Charter the property is exempt from tax. The Supreme Court of the United States has also held that no other mode or method of taxation, except the income tax, can be imposed under this Charter, and as no higher tax than one-half of 1% can be imposed, this tax when imposed is exhaustive of the power of the State.

While there was no general income tax statute in Georgia when this Charter was passed, the Legislature, as the Supreme Court of Georgia has said, must be presumed to have been familiar with the general subject. Certainly it would be a violent assumption to suppose that the Legislature imposed the income tax in ignorance of what it was doing.

Moreover, all railroads in Georgia were habitually taxed ½ of 1% on their net income, whether they had a charter contract or not, until 1874, when the method of taxing railroads was changed to a tax on their property ad valorem.

If in the Hale case the holders of the bonds were taxed under a statute of Iowa ½ of 1% on the income

of the bonds, and this statute was a contract, an additional tax of 5½% could not have been imposed under a subsequent general income tax act. That is exactly the case here.

In *Wright* v. *Georgia Railroad & Bkg. Co.*, 216 U.S. 420, the State was seeking to tax the Georgia Railroad with a Franchise Tax Act which was passed in 1902 (Acts 1902, p. 37). There never had been any franchise tax in Georgia before this. In 54 Lawyers' Co-Operative Ed. p. 548, where this case is reported, the argument of John C. Hart and Samuel H. Sibley, representing Comptroller General Wright, is quoted as follows: "The fact that a franchise had never been taxed when the stipulations were made may explain why no agreement was made respecting it, but does not operate to hinder bringing within the power of taxation the new subject matter". The Supreme Court of the United States brushed this argument aside. If the new franchise tax could not be imposed without violating the Charter, a fortiori, the new income tax of 1931 cannot be imposed without violating the Charter.

But, as we have argued elsewhere in this brief, it makes no difference whether the Charter tax is a property tax or an income tax, the tax having been imposed under the Charter up to the maximum, no other or additional tax whatever it may be called, can be imposed.

XIV

Other cases cited by the Supreme Court of Georgia and by Appellee in its motion to dismiss or affirm, distinguished.

Clyde v. *Gilchrist*, 262 U.S. 94.

Adams Mfg. Co. v. *Storen*, 304 U.S. 307.

These two cases are similar to the case of *Hale* v. *State Board*, 302 U.S. 95, and are inapplicable for the same reasons set forth in the preceding point, which distinguishes that case.

Ex rel. *Cohn* v. *Graves*, 300 U.S. 308.

This case decides that "a State may tax her citizen upon the income he receives by way of rents from lands situate in another State and by way of interest on bonds secured by mortgage on lands situate in another State"; and it also decides that "a tax on the income from land is not a tax on the land". The first proposition is irrelevant and the last proposition supports our argument that the tax in this case is not a property tax.

Mason Co. v. *Tax Com. of Washington*, 302 U.S. 186.

This case merely decides that "a State Occupation Tax on gross receipts may constitutionally include the receipts from construction work done under a contract with the United States". There were only two questions in this case—one, whether the tax imposes an unconstitutional burden upon the Federal Government; and the other was, whether the area in which the work was performed was within the exclusive jurisdiction of the United States. This case does not seem to touch the case at bar.

Adams v. *Saenger*, 303 U.S. 59.

This case involved a question of what effect should be given in one State to the judgment of another State. The citation was probably a mistake.

Helvering v. *Bankline Oil Co.*, 303 U.S. 362.

Graves v. *O'Keefe*, 306 U.S. 466.

The first case involved the question whether a Federal tax on the profits from land leased from the State was invalid as an unconstitutional burden on a State instrumentality, and the second case involved the question whether the State of New York could tax the salary of a New York resident earned as Attorney for the Federal Home Owners Loan Corporation, which was a Federal instrumentality. These cases do not seem to remotely touch the case at bar.

New York Rapid Transit Corp. v. *State of N. Y.*, 303 U.S. 573.

In this case a privilege tax of 3% on gross income was imposed on the New York Rapid Transit Corporation. The question was whether this tax violated the contract of this corporation with the City of New York. The Court said on page 590: "We searched in vain for any provision in the contract which expressly exempts the corporation from the payment of this tax or indeed any tax", and again on page 591 the Court said "Not only is the corporation unable to point to an unmistakable exemption, but the contract itself contains an express provision permitting the deduction of taxes from the gross receipts".

U. S. Trust Co. v. *Helvering*, 307 U.S. 57.

This case is wholly irrevelant. The only question in the case was whether the proceeds of a war risk insurance policy payable to a soldier's widow should be included as a part of the soldier's gross estate for purposes of Federal estate taxes.

XV

Conclusion.

We think we have demonstrated the proposition that the position of the Appellee "that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument" (Rule 7 (4)), is not well taken. Moreover, we think that we have demonstrated that the judgment of the Supreme Court of Georgia should be reversed.

Respectfully submitted,

CARL H. DAVIS
(Wilmington, N. C.)

PHILIP H. ALSTON
(Atlanta, Ga.)

T. M. CUNNINGHAM,
(Savannah, Ga.)

Attorneys for Atlantic Coast Line Railroad Company.

August 6, 1946.

APPENDIX I

Extract from Sections 12 and 14 of Charter of Georgia Railroad Company (Acts 1833 pp. 262, 263).

Sec. 12 * * * "that the said company may, when they see fit, rent or farm out all or any part of their said exclusive right of transportation or conveyance of persons on the rail-road or rail-roads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon, subject to the rates above mentioned. And the said company, in the exercise of their right of carriage or transportation of persons or property, or the persons so taking from the company the right of transportation or conveyance, shall, so far as they act on the same, be regarded as common carriers." * * *

Sec. 14 * * * "That whenever the company aforesaid shall see fit to farm out as aforesaid, to any person or persons, or body corporate, any part of their exclusive right of conveyance and transportation, or shall deem it expedient to open the said road or any part thereof, to public use, they shall and may adopt and enforce all necessary rules and regulations, and have power to prescribe the construction and size or burthen of all carriages and vehicles, and the materials of which such shall be made, that shall be permitted to be used or pass on the said rail road, and the locomotive power that shall be used with them." * * *

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

No. 385

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant,

vs.

M. E. THOMPSON, STATE REVENUE COMMISSIONER OF THE STATE OF GEORGIA,
Appellee.

BRIEF FOR ATLANTIC COAST LINE RAILROAD COMPANY

CARL H. DAVIS

PHILIP H. ALSTON

T. M. CUNNINGHAM

Attorneys for Atlantic Coast Line Railroad Company.

December 26, 1946.

SUBJECT INDEX

		Page
1.	Statement of the Case	1
2.	Assignment of Errors	5

Argument.

I	The Charter tax is an irrevocable contract	12
II	History of previous litigation	14
III	Invariable practice to tax net income and not rentals	18
IV	Tax levied exclusively on net income. Property exempt. When income tax levied, State's power is exhausted	19
V	This Court has held that contract inures to Lessees	22
VI	Georgia Supreme Court did not follow construction put by U. S. Supreme Court on charter	27
VII	Charter tax is not a property tax. It is an income tax	31
VIII	Income taxes habitually levied on Railroads in Georgia until the Act of 1874	35
IX	The Charter is impaired by taxing the net income at 5½%, irrespective of whether the Charter tax is called a property tax or an income tax	39
X	Rochester Ry. v. Rochester, 205 U.S. 236, and kindred cases distinguished	40
XI	Contract is impaired however slightly its value may be diminished	42
XII	Hale v. State Board, 302 U.S. 95, distinguished	43
XIII	Other cases cited by Supreme Court of Georgia and by Appellee, distinguished	46

Page

Appendix I—Extracts from Sections 12 and 14 of Charter of Georgia Railroad Company 49

Appendix II—Acts of the Legislature of Georgia imposing income taxes on railroads 50

Appendix III—Railroads incorporated by Georgia Legislature which had tax limitations in their charters of ½ of 1% on net income 54

TABLE OF CASES CITED

	Page
Adams v. Saenger, 303 U.S. 59	47
Adams Mfg. Co. v. Storen, 304 U.S. 307	46
Central of Georgia Ry. Co. v. Wright, 248 U.S. 525	7, 9, 13, 16, 17, 25, 26, 27, 41, 42
Central of Georgia Ry. Co. v. Wright, 249 U.S. 590	13, 17, 26
Central of Georgia Ry. Co. v. Wright, 250 U.S. 519	7, 9, 13, 17, 26, 27
Central of Georgia Ry. Co. v. Wright, 206 Fed. 107	13, 15
Central R.R. & Bkg. Co. of Ga. v. Georgia, 92 U.S. 655	13
Clyde v. Gilchrist, 262 U.S. 94	46
Cohn v. Graves, 300 U.S. 308	46
Farrington v. Tennessee, 95 U.S. 679, 683	43
Featherstone v. Norman, 170 Ga. 370	32
Flint v. Stone Tracy Co., 220 U.S. 108	35
Georgia v. Georgia R.R. & Bkg. Co., 54 Ga. 423	12
Georgia R.R. & Bkg. Co. v. Wright, 132 Fed. 912	12, 15, 18, 19, 40
Goldsmith v. Augusta & Savannah R.R., 62 Ga. 468	18
Graves v. O'Keefe, 306 U.S. 466	47
Hale v. State Board, 302 U.S. 95	9, 32, 43
Helvering v. Bankline Oil Co., 303 U.S. 362	47
Home Insurance Co. v N.Y., 134 U.S. 594	35
Jetton v. University of South, 208 U.S. 489	40, 41, 42
Louisville & Nashville R.R. Co., et al. v. Wright, 199 Fed. 454	13, 15, 19, 30
Mason Co. v. Tax Com. of Washington, 302 U.S. 186	46
Morris Canal Co. v. Baird, 239 U.S. 126	40, 41
New York Rapid Transit Co. v. New York, 303 U.S. 573	47
Norfolk & Western Ry. v. Boyle, 12 F. Supp. 522, 523	42
Pacific Co. v. Johnson, 285 U.S. 481	35
Provident Institution v. Mass., 6 Wall. 611	35
Rochester Railway v. Rochester, 205 U.S. 236	40, 41
Savannah, Mayor of, v. Hartridge, 8 Ga. 23	37
Society for Savings v. Coite, 6 Wall. 594	35
South Western R.R. Co. v. Ga., 92 U.S. 676	13
South Western R.R. Co. v. Wright, 116 U.S. 231	13
South Western R.R. Co. v. Wright, 68 Ga. 311	13
State v. Western & Atlantic R.R. Co.	34
Thompson, State Rev. Co. v. A.C.L. R.R. Co., 38 S.E. Rep. (2d) 774	1, 27, 29, 31, 35, 37
U.S. Trust Co. v. Helvering, 307 U.S. 57	48
Van Hoffman v. City of Quincy, 4 Wall. 535, 552, 553	43
Winter v. Jones, 10 Ga. 190	43
Wright v. Central of Ga. Ry. Co., 146 Ga. 406	13, 16, 26
Wright v. Central of Ga. Ry. Co., 236 U.S. 674	7, 13, 15, 16, 23, 25
Wright v. Georgia R.R. & Bkg. Co., 216 U.S. 420	7, 12, 15, 20, 28, 29, 30, 33, 45

Page

Wright v. Louisville & Nashville R.R. Co., et al., 236 U.S. 687 ..... 7, 13, 15, 18, 23, 30, 41
Wright v. Louisville & Nashville R.R. Co., et al., 201 Fed. 1023 ..... 13, 15
Wright v. South Western R.R. Co., 64 Ga. 783 13

SECTIONS OF THE CODE OF GEORGIA CITED

Code Section 6-501 —Appeal de novo hearing 4
" " 92-2602)
" " 92-2603)—Act of 1874 taxing railroads ad valorem 15
" " 92-3102 —Income tax 4
" " 92-8432 —Protest of tax assessment 4
" " 92-8446 —Appeal from assessment 4

JUDICIAL CODE SECTION CITED

Code Section 237(a)—Appeal to Supreme Court 5

ACTS OF THE LEGISLATURE OF GEORGIA CITED

Act 1833—Charter of Georgia R.R. 2, 3, 40
Act 1835—Name changed to Georgia R.R. & Bkg. Co. 2
Act 1835—Charter of Central R.R. & Bkg. Co. of Ga. 13
Act 1838—Charter of Augusta & Waynesboro R.R. 14
Act 1845—Charter of South Western R.R. Co. 14
Act 1856—Name Augusta & Waynesboro changed to Augusta & Savannah Railroad 14

Act 1858)
Act 1861)
Acts 1868)—Acts taxing Railroads on Income 10, 11
Act 1869)
Act 1872)
Act 1873)
Act 1874)

Act 1863—General Income Tax
Act 1864— " " "
Act 1866—Repealed General Income Tax Acts 36

Act Feb. 28, 1874—Railroads Taxed ad valorem 11, 14, 35, 37
Act 1931—Income Tax Act 4, 5, 6, 10, 11, 26, 39, 40

CONSTITUTION OF UNITED STATES

Art. 1—Sec. 10, Par. 1 ..... 8, 11

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 385

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant,

vs.

M. E. THOMPSON, STATE REVENUE COMMISSIONER OF THE STATE OF GEORGIA,
Appellee.

BRIEF FOR ATLANTIC COAST LINE RAILROAD COMPANY.

Statement of the Case.

This case involves the liability of Appellant as one of the joint Lessee of the railroads of Georgia Railroad and Banking Company for income taxes to the State of Georgia assessed under the Income Tax Act of 1931 at 5½% on the net income of certain of the leased lines, which income under the Charter of Lessor is taxable not higher than one-half of 1%. The case turns on the interpretation of the contract contained in the Charter of Georgia Railroad and Banking Company, which has several times been construed by this Court. Appellant believes that the construction placed on this contract by the Supreme Court of Georgia is contrary to the decisions by this Court construing and applying the said contract. The decision of the Supreme Court of Georgia in this case is reported in 38 Southeastern Reporter, (2d) page 774.

There are no disputed facts in this case. Most of the facts are contained in an agreed statement of facts (R. 42).

Georgia Railroad and Banking Company leased its railroad properties to William M. Wadley, May 7, 1881, for a term of 99 years from April 1, 1881, at an annual rental of $600,000. By successive transfers Appellant and Louisville and Nashville Railroad Company eventually became the Lessees, each being the Lessee of a one-half interest in the leased property. The leased properties are operated by the Lessees through the medium of an unincorporated agency designated as the "Georgia Railroad". (R. 42, 46).

Section 15 of the Charter of Georgia Railroad Company (Acts 1833, p. 256), the name of which was changed to Georgia Railroad and Banking Company (Acts 1835, p. 181) provides:

> "The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them; and after that, shall be subject to a tax not exceeding one-half percent per annum on the net proceeds of their investments."

This Charter provision is applicable only to the main line of railroad from Augusta, Ga., to Atlanta, Ga., and the branch from Union Point, Ga., to Athens, Ga. (R. 43). This provision of the Charter is hereafter referred to as the "Charter tax limitation" and the lines of railroad covered by it are hereafter referred to as the "Charter tax lines".

The power to lease is conferred by Sections 12 and 14 of the Charter (Acts 1833, pp. 256, 262, 263), a copy of which Sections are attached hereto (Appendix 1).

The State Revenue Commissioner (the predecessor of Appellee) assessed against Appellant deficiency income taxes, for the years 1941, 1942, and 1943, the deficiency being the amount of one-half of the net income from the operation of the Charter tax lines, and the assessment being at the rate of 5½% on this net income. The amount of the deficiency tax assessed for the three years is $179,271.80, with interest to March 5, 1946, of $20,218.13, besides interest from March 5, 1945, on the principal sum at the rate of 1% per month, until paid.

The State Revenue Commissioner assessed similar deficiency income taxes in the same amount against Louisville & Nashville Railroad Company, Lessee of the other one-half interest of the Georgia Railroad (R. 48).

The re-determination of the tax was arrived at by the Revenue Commissioner by treating the Georgia Railroad and all of its branches, as a unit, or system, and no effect was given by him to the Charter, nor was any credit given for the one-half of 1% tax paid by Georgia Railroad and Banking Company (R. 47).

The thing taxed under Section 15 of the Charter is not the rental received by the Lessor, but is the net income from the operation of the Charter tax lines. The tax of one-half of 1% under said Section 15 of the Charter has been returned and paid on that basis for more than 100 years. (R. 41, 47, 68).

The tax is assessed under the Income Tax Act of March 31, 1931, and amendments, (Acts 1931, Ex. Session, p. 24; Acts 1937, pp. 109, 117) now codified in Annotated Code of Georgia, Section 92-3102, the material portion of which is as follows:

> "Every domestic corporation and every foreign corporation, shall pay annually an income tax equivalent to five and one-half per cent. of the net income from property owned or from business done in Georgia as is defined in Section 92-3113." (R. 46).

Appellant duly protested the assessment of said deficiency as allowed by Code of Georgia Annotated, Section 92-8432, (R. 2 to 7 inc.), and upon the protest being overruled and the assessment made final (R. 7, 8), Appellant appealed from the assessment to the Superior Court of Chatham County, as allowed by Code of Georgia Annotated Section 92-8446 (R. 18). The appeal opens up the whole matter to a de novo investigation. (Code of Georgia annotated, Sec. 6-501).

The State Revenue Commissioner of Georgia, in an effort to destroy the tax limitations of the Charters of the Georgia Railroad and Banking Company and of the Augusta and Savannah Railroad and the South Western Railroad Company (which two latter Companies have similar tax limitations to that contained in the Charter of the Georgia Railroad), has started proceedings (a) to tax the Charter tax lines of each of these three Railroad Companies on the ad valorem basis; (b) to tax the rentals received by each of these three Companies from their respective leases, 5½% under the Income Tax Act of 1931; (c) and to tax to the respec-

tive Lessees of each of these three companies the net income from the operation of their Charter tax lines at the rate of 5½% under the Income Tax Act of 1931. (R. 58 to 67 inc.).

The case was heard in the Superior Court by the Judge without a jury and he sustained the appeal and held that the Charter was an irrepealable contract and that the assessment was null and void (R. 29, 30). The State Revenue Commissioner made a motion for a new trial (R. 30), which was overruled (R. 39), and he thereupon took a bill of exceptions to the Supreme Court of Georgia (R. 69). The Supreme Court of Georgia reversed the judgment of the Court below, and in the judgment reversing the Court below, direction was "given that the trial Court vacate its former judgment and enter a judgment denying the appeal of said Company and rendering judgment in favor of M. E. Thompson, State Revenue Commissioner, sustaining the tax assessment as made" (R. 89).

The case is here on appeal from the judgment of the Supreme Court of Georgia, the jurisdiction of this Court being predicated on Judicial Code Section 237 (a) as amended by the Act of January 31, 1928, Ch. 14, Section 1, 45 Stat. 54. The statement as to the jurisdiction of this Court as required by Rule 12 is in the original record.

This Court has noted probable jurisdiction. (R. 128)

ASSIGNMENT OF ERRORS.
(R. 93)

1. The Supreme Court of Georgia erred in sustaining the validity of the said Income Tax Act of March 31, 1931, as amended, under which the taxes

in this case were assessed against Atlantic Coast Line Railroad Company, and in overruling the contention of Atlantic Coast Line Railroad Company, duly made in the pleadings in this case, that the said Act of March 31, 1931, as so applied impaired the contract contained in Section 15 of the Charter of Georgia Railroad Company (Acts 1833, p. 256) the name of which was changed to Georgia Railroad and Banking Company (Acts 1835, p. 181), contrary to Article 1, Section 10, Paragraph 1, of the Constitution of the United States which provides that "No State shall pass any law impairing the obligation of contracts". There was thus drawn in question the validity of a statute of the State of Georgia on the ground of its being repugnant to the Constitution of the United States, and the decision of the Supreme Court of the State of Georgia was in favor of the validity of said Statute.

2. The Supreme Court of Georgia failed to decide that said Section 15 of the Charter of Georgia Railroad & Banking Company was an irrevocable contract, protected by the Contract Clause of the Constitution of the United States, and that the said contract inured in this matter to the benefit of Atlantic Coast Line Railroad Company, the Lessee of the lines of railroad of Georgia Railroad and Banking Company covered by said Section 15 of the Charter, but by-passed this question and erroneously construed the Charter with the purpose and intent to avoid a decision on the question that the Charter was an irrevocable contract with the State of Georgia.

3. The Supreme Court of Georgia erred in holding that the tax imposed by Section 15 of the Charter of Georgia Railroad and Banking Company is a prop-

erty tax and that said Section 15 constitutes no bar to the collection of the income tax under the 1931 Income Tax Act from the net income derived by the Lessee from the Leased Lines covered by the said charter tax limitation.

4. The decision of the Supreme Court of Georgia, that the tax imposed under Section 15 of the said Charter is a property tax, is contrary to the decisions of the Supreme Court of the United States construing this Charter in the cases of *Wright* v. *Georgia Railroad & Banking Company*, 216 U.S. 420, and *Wright* v. *Louisville & Nashville Railroad Company* and *Atlantic Coast Line Railroad Company*, 236 U.S. 687; and the similar charters of South Western Railroad Company and Augusta and Savannah Railroad in the cases of *Wright* v. *Central of Georgia Railway Company*, 236 U.S. 674, and *Central of Georgia Railway Company* v. *Wright*, 248 U.S. 525; 250 U.S. 519. The Supreme Court of the United States in said cases has construed this charter tax as a tax on income and has further held that under said Charter a property tax could not be imposed and that no tax could be imposed except the tax of ½ of 1% on the net income of the Charter lines.

5. The Supreme Court of Georgia is bound to follow the construction put on the Charter by the Supreme Court of the United States, where the question involved, as here, is whether the Act of the State Legislature impairs the obligation of the Charter contrary to the Federal Constitution.

6. The thing taxed under Section 15 of said Charter is the net income of the lines of railroad covered by the Charter tax limitation, whether the net income is earned from the operation of the railroads by the

Georgia Railroad & Banking Company or by its Lessees. The thing taxed is not the rental received by the Lessor. This has been the invariable practice of one hundred years and the decisions of both the Supreme Court of Georgia and the Supreme Court of the United States construing this Charter, are to this effect. The Supreme Court of Georgia has so decided in the case at bar; but has erroneously applied this fact as upholding its construction of the Charter, that the Charter Tax is a property tax, whereas this fact destroys the holding of the Supreme Court of Georgia that the Charter tax is a property tax. The Supreme Court of Georgia erred in not holding that Section 15 of the Charter, taken in connection with the provisions of the Charter conferring the power to lease, contemplates that a tax of ½ of 1% should be the maximum tax imposed on the net earnings from the operations of the railroads covered by Section 15 of the Charter; and that when so taxed the power of the State to tax either the Lessor or the Lessees is exhausted.

7. The Supreme Court of Georgia erred in not holding that the tax provisions of Section 15 of the Charter inured to the Lessees and that the taxation to the Lessees of the net income of the lines of railroad covered by said Section 15 at the rate of 5½% under the said Income Tax Act of March 31, 1931, impaired the obligation of the contract, contrary to the Contract Clause of the Federal Constitution, the same income having been already taxed ½ of 1% under Section 15 of the Charter.

8. The Supreme Court of Georgia erred in ignoring and in not following the decisions of the Supreme Court of the United States in the case of *Wright*,

Comptroller General, v. *Central of Georgia Railway Company*,* 248 U.S. 525, and 250 U.S. 519. In these two cases the Supreme Court of the United States held that it impaired the contracts contained in the Charters of the South Western Railroad Company and the Augusta and Savannah Railroad to tax Central of Georgia Railway Company, the Lessee of these railroads, on its leasehold interest. The Charters of these two Lessor railroads contain substantially similar provisions as to taxation as does the Georgia Railroad and Banking Company Charter. This decision is applicable to the Georgia Railroad and Banking Company and is in nowise distinguishable. The contention of Appellant was that as the leasehold interest of Atlantic Coast Line Railroad Company could not under the authority of this decision, be taxed to it without impairing the obligation of the contract contained in Section 15 of the Georgia Railroad Charter, a fortiori, the income from the leasehold interest could not be taxed without impairing the obligation of Section 15 of the Charter. The Supreme Court of Georgia did not merely overlook these decisions of the Supreme Court because they were pointedly called to its attention both in the briefs and on the oral argument.

9. The Supreme Court of Georgia erred in resting its decision of the case at bar on the decision of the Supreme Court of the United States in *Hale* v. *State Board*, 302 U.S. 95. The errors in this are as follows:

(a) In the Hale case the Statutes of Iowa exempted from taxation certain bonds issued by the State and its subdivisions. The State of Iowa subsequently taxed the interest on the bonds under an income tax

*The correct citation is Central of Georgia Railway Company v. Wright, Comptroller General.

act. The Supreme Court of Iowa held that as there was no income tax act in existence when the bonds were issued, it construed the exemption as not covering a tax on income, and the Supreme Court of the United States followed the decision of the Iowa Court. In the case at bar, Section 15 of the Charter of the Georgia Railroad imposes a tax on income, eo nominee, and limits it to ½ of 1%, so that there is no room for the construction, which the Supreme Court of Georgia puts on the Charter, that the Charter permits a tax on income of 5½% under the Income Tax Act of 1931.

(b) The Supreme Court of the United States followed the construction of the Supreme Court of Iowa, which it was not bound to do; but in the case at bar the Supreme Court of Georgia does not follow the construction of the Supreme Court of the United States of the Georgia Railroad Charter which it is bound to do.

10. In seeking to bring the case at bar within the orbit of the Hale case, the Supreme Court of Georgia states in its opinion that at the time the Georgia Railroad Charter was granted in 1833 there was no general law providing for income taxes. Until the Constitution of 1868 there was no provision as to uniformity of taxation. When this Charter was passed, railroads were a new species of property. Most of the railroad charters which were granted between 1833 and January 1, 1863, (when the Code went into effect which prohibited perpetual charter exemptions) contained the provision for a tax on net income at ½ of 1%. By 1858, when several railroads were finally constructed, the Legislature passed an act taxing all railroads one-half of 1% on their net annual income (Acts 1858, Section 8, p. 104), and this policy was continued in several suc-

cessive Acts. (Act December 14, 1861, p. 80; Section 5; Acts 1868, p. 143; Act October 5, 1868, Section 3, p. 154; Act March 18, 1869, p. 160; Act January 19, 1872, Section 3, p. 276; Act February 20, 1873, p. 65; Act February 26, 1874, Section 3, p. 103). This species of property continued to be taxed on the income basis until February 28, 1874, (Acts 1874, p. 107) when all tax exemptions of railroads were repealed and it was provided that they should all be taxed on the ad valorem basis, which latter Act brought on all the litigation which ensued over these special charters. The Legislature of Georgia, when it passed the Act of 1833, must be presumed to have known the difference between a property tax and an income tax, and it must be presumed that it deliberately chose to tax the net income, whether made by the Lessor or Lessee, and not the property on the ad valorem basis.

11. The Supreme Court of Georgia erred in not holding that irrespective of whether the tax imposed under Section 15 of the Charter of the Georgia Railroad & Banking Company was a property tax or an income tax, that the taxation to Atlantic Coast Line Railroad Company of the net income received by it from the operation as Lessee of the lines of the Georgia Railroad & Banking Company covered by Section 15 of the Charter at the rate of 5½% under the Income Tax Act of March 31, 1931, when the same income had been taxed at the rate of ½ of 1% under Section 15 of the Charter of the Georgia Railroad and Banking Company, impaired the obligation of the Charter contrary to the Contract Clause of the Constitution of the United States. Whether the tax levied under Section 15 of the Charter is defined as a property tax or an income tax, the net income from the operation

of the lines of railroad covered by Section 15 of the Charter, is the thing on which the tax is levied, and it makes no difference, whether the income is earned by the Lessor or the Lessee, as the Supreme Court of the United States has distinctly held that the tax provisions of the Charter inures to the Lessee; moreover, when the tax of ½ of 1% is imposed on the net earnings under the Charter a higher tax cannot be imposed on the net earnings on either the Lessor or the Lessee without impairing the obligation of the contract, contrary to the aforesaid Contract Clause of the Constitution of the United States.

All of the assignments of errors are set forth because it is intended to urge all of them. The argument which follows is not preceded by a summary because the assignment of errors summarizes the argument.

ARGUMENT.

I.

The tax provision in section 15 of the Charter of The Georgia Railroad and Banking Company is an irrevocable contract with the State of Georgia, and is protected by Article I, Section 10, par. 1, of the Constitution of the United States against impairment by subsequent legislation.

This Charter has been decided by both the Supreme Court of Georgia and the Supreme Court of the United States to be an irrevocable contract.

Georgia v. *Georgia R.R. & Bkg. Co.*, 54 Ga. 423.

Wright v. *Georgia R.R. & Bkg. Co.*, 216 U.S. 420;
Affirming—*Georgia R.R. & Bkg. Co.* v. *Wright* 132 Fed. 912.

Wright v. *Louisville & Nashville R.R. Co. et al*, 236 U.S. 687.

Affirming—*Louisville & Nashville R.R. Co. et al*, v. *Wright*, 199 Fed. 454, and *Wright* v. *Louisville & Nashville R.R. Co., et al*, 201 Fed. 1023.

The Charters of Central Railroad and Banking Company of Georgia, Augusta and Savannah Railroad and South Western Railroad Company, which had charters under which there was a limit of taxation on net income of one-half of one percent, have likewise been held by the Supreme Court of Georgia and the Supreme Court of the United States to be irrevocable contracts.

Central R.R. & Bkg. Co. of Georgia v. *Georgia*, 92 U.S. 655.

South Western R.R. Co. v. *Georgia*, 92 U.S. 676.

South Western R.R. Co. v. *Wright*, 116 U.S. 231;

Affirming—*Wright* v. *South Western R.R. Co.* 64 Ga. 783, and *South Western R.R. Co.* v. *Wright*, 68 Ga. 311.

Wright v. *Central of Georgia Ry. Co.* 236 U.S. 674;

Affirming—*Central of Georgia Ry. Co.* v. *Wright*, 206 Fed. 107.

Central of Georgia Ry. Co. v. *Wright*, 248 U.S. 525;

Reversing—*Wright* v. *Central of Georgia Ry. Co.*, 146 Ga. 406. Rehearing granted, 249 U.S. 590; and reaffirmed in 250 U.S. 519.

The tax limitation of Central Railroad & Banking Company of Georgia is contained in Section 18 of its Charter (Acts 1835 p. 217):

The tax limitation of South Western Railroad Company is contained in Section 14 of its Charter (Acts 1845 p. 132).

The tax limitation of Augusta & Waynesboro Railroad (name changed to Augusta & Savannah Railroad, Acts 1856 p. 185) is contained in Section 13 of its Charter (Acts 1838 p. 174).

II.

The history of the previous litigation in the Supreme Court of the United States, construing the Charter of the Georgia Railroad, and kindred Charters.

Many railroads were chartered by the Legislature of Georgia (prior to the Code of January 1, 1863, which prohibited the grant of irrevocable charters) which had tax limitations of ½ of 1% on their net income. All of these Companies have passed out of existence except three—Georgia Railroad and Banking Company, Augusta and Savannah Railroad, and South Western Railroad Company, the railroads of the two latter being leased by Central of Georgia Railway Company.

All railroads in Georgia, whether they had Charter tax limitations or not, were commonly taxed at the rate of ½ of 1% on their net incomes, until the Act of February 28, 1874, (Acts of 1874, p. 107), the title of which Act is "An Act to amend the tax laws of this State so far as the same relate to railroad companies, and to define the liabilities of such companies to taxation, and to repeal so much of the Charters of such companies, respectively, as may conflict with the provisions of this Act". This Act provides that the railroads should be taxed as other property of the

people of the State, (Codified, except as to title, Code of Georgia Ann., Secs. 92-2602, 2603). This Act brought on all the litigation over these Georgia railroad Charters which subsequently ensued.

In *Wright* v. *Georgia Railroad & Banking Company*, 216 U.S. 420, affirming 132 F. 912, the State of Georgia sought to tax Georgia Railroad & Banking Company with a franchise tax, and also sought to tax the said Company with the increased value of its property due to additions and betterments. This Court held in this case, that the attempted tax would violate the Charter of the Company, that its property was exempt from taxation, and that the Company was not subject to any form of taxation except the tax of ½ of 1% on the net income, and that this tax would exhaust the power of the State to tax.

The cases of *Wright* v. *Louisville & Nashville Railroad Co., et al.*, 236 U.S. 687, affirming 199 F. 454, and 201 F. 1023, and *Wright* v. *Central of Georgia Railway Company*, 236 U.S. 674, affirming 206 F. 107, were companion cases. Central of Georgia Railway Company was the Lessee of Augusta and Savannah Railroad and South Western Railroad which had Charter tax limitations similar to that of the Georgia Railroad. The Lessors were not parties to these cases. The contention in both cases was that the Lessees had long term leases and were the virtual owners of the properties, in view of which the State attempted to tax the Lessees with the fee of the properties. In both cases the Supreme Court dwelt on the power to lease contained in the Georgia Charter and contained in the Augusta and Savannah Charter, and the Court held in the Central of Georgia case (p. 679) that "No

change in the manner of tax exemption was expected to follow from the demise of the road, any more than it would have followed from the admission of another carrier to partial rights or of an individual to carry his own goods", and made the same observation in the Georgia Railroad Charter case (p. 689). These two cases did not turn on the Fourteenth Amendment. They held specifically that the Lessees were protected by the Charter and that the Charter inured to the Lessees; and that the Lessor already had been exhaustively taxed in the manner pointed out by the Charter, and the Charter contract prevented the fee from being taxed to the Lessees.

These two cases involving the taxation of the fee to the Lessees were followed by the case of *Central of Georgia Railway Company* v. *Wright*, 248 U.S. 525, reversing 146 Ga. 406. The contention in this case was that the leasehold interest of the Central of Georgia Railway Company in the Augusta and Savannah Railroad and in South Western Railroad Company was property under the laws of Georgia, and was taxable as property. The Court decided in this case (p. 526) that the case "presents another attempt to accomplish, by a change in form, what in Wright v. Central of Georgia Railway Company, 236 U.S. 674, was held to be an unconstitutional result", and that the Lessee was protected by the Charter from being taxed with the leasehold interest, although the leasehold interest was property of the Lessee. At the end of his opinion in that case Mr. Justice Holmes says (248 U.S. at page 527): "The charter contracts in question are of a kind that goes back to the time when railroads were barely beginning, and that would not be likely to be repeated, *but of course will be carried out by the state*

according to what was meant when they were made". (Italics ours). A re-hearing was granted in this case, *Central of Georgia Railway Company* v. *Wright*, 249 U. S. 590, as to the charter tax under the Charter of the South Western Railroad. On the re-hearing, *Central of Georgia Railway Company* v. *Wright*, 250 U.S. 519, the Court re-affirmed its decision in 248 U.S. 525 as to the South Western Railroad.

That decision in 1919 concluded any attempt on the part of the State to tax the Atlantic Coast Line Railroad Company and the Louisville & Nashville Railroad Company, as Lessees of the Georgia Railroad, with their leasehold interest, because the situation in the Georgia Railroad leases was exactly the same as the situation in the Augusta and Savannah and South Western Railroad Company leases. If the leasehold interest was not taxable to the Lessees and if they were protected by the Charter from being taxed ad valorem on the leasehold interest, it follows, a fortiori, that they cannot be taxed 5½% on the income from the leasehold interest.

The case at bar is a part of a studied purpose of the taxing authorities of the State of Georgia after the lapse of more than twenty-five years, to avoid and evade the Charter tax limitations of the Charters of the Georgia Railroad and Banking Company, Augusta and Savannah Railroad and South Western Railroad Company. The State is now proposing to tax the Georgia Railroad and Banking Company, the Augusta & Savannah Railroad, and the South Western Railroad on their properties on the ad valorem basis, just as though the Charter tax limitations had never existed. (R. 67). The State also proposes to tax the

Georgia Railroad and Banking Company (R. 60), Augusta and Savannah Railroad (R. 58), and the South Western Railroad (R. 62) 5½% on their respective rentals, in addition to the Charter tax of ½ of 1% on the net income of the Charter tax lines.

III.

It has been the invariable practice for more than 100 years to tax the net income of the Charter tax Lines and not the rentals paid by the Lessee.

In the stipulation of facts in the case of *Wright* v. *Louisville & Nashville RR Co. et al.*, 236 U.S. 687, the following appears:

> "Taxes paid by the Lessor — The Lessor since the lease, during the thirty years as before the lease, has annually returned the net earnings of the chartered property — not the rental — for taxation and has paid to the State one half of one percent on the net earnings and not the rental." (R. 68). See also evidence of H. E. Judge (R. 41).

In *Goldsmith v. Augusta and Savannah Railroad*, 62 Ga. 468, it was held (p. 472) "the income contemplated by the Charter is not the annual rental, but the earnings of the road".

In *Georgia R.R. & Bkg. Co. v. Wright*, 132 Fed. 912, (decided in 1904) Judge Newman said "The State has for sixty years or more allowed the Company to return its net earnings and pay a tax thereon of one-half of 1% without objection".

In *Louisville & Nashville R.R. Co., et al.* v. *Wright*, 199 Fed. 434, Judge Newman says:

> "The very way in which these two things are placed in the charter seems to indicate that, even though operated by others, the taxes imposed should be upon the income, whether the income came from the operation of the road by the chartered company or by others to whom it might rent or farm out the privilege of transportation." (pp. 437-8).

The scheme of the Charter as interpreted both by the earlier decisions of the Supreme Court of Georgia and by this Court is that the net income of the Charter tax lines should be taxed no matter who earned it, whether Lessor or Lessee, and that when this tax is paid, the power of the State to tax further or differently to either Lessor or Lessee is exhausted.

IV.

Under the Georgia Railroad Charter the tax is levied exclusively on the net income of the Charter tax lines. The property is exempt from taxation. When the tax of ½ of 1% is levied, the power of the State to tax further is exhausted.

In *Georgia Railroad & Banking Company* v. *Wright* 132 Fed. 912, the State sought to impose a franchise tax on the Company and also to tax it with the increased value of its property due to additions and betterments and other causes. Judge Newman, in opening his opinion in this case, states the Complainant is seeking " a decree adjudging that it is not liable for a property tax on its railroad, or any tax on its franchise, and that the only tax for which it is liable is a tax to the State

of one-half of 1 per cent. on the net earnings of its investments". And then Judge Newman goes on and decides (p. 919): "The scheme of taxation provided for this Company in its charter is a broad one, and, in my judgment, the tax of one-half of 1 per cent. on its net earnings embraces all the taxation it was intended should be exacted of this Company * * It is clear that it was the intention of the Legislature to provide a full and complete system of taxation for this corporation, and that it embraces its whole liability for taxation."

In *Wright* v. *Georgia Railroad & Bkg. Co.*, 216 U.S. 420, which affirmed Judge Newman's decision in 132 F. 912, the Court held:

> (p. 422) "The Court below sustained the contention of the railroad company, and held that the scheme of taxation found in the charter of the company was of inviolable obligation and enjoined any method of taxation conflicting with the stipulations of the charter."
>
> (p. 426) "That the only mode of taxation stipulated for after the period of total exemption is a tax upon the net income of the company's property is seemingly the plain and obvious meaning of this contract. That this is the way in which it has been read and interpreted by everybody who has had to do with the matter of taxation in an official way since 1845, when the railroad seems to have been finished, affords strong evidence that this construction accords with the intent of the charter."
>
> (p. 430) "After all, the precise question is, whether the legislative purpose, as expressed, was that the railroad incorporated should pay no tax except one based upon net profits of operation, or was it the intention that a specific amount of capital only should be so relieved? Undoubtedly, the State did not intend that any

other capital than that authorized and invested directly in this specific railroad should be immune. That is plain by the express limitation of the charter. But is there any contingency under which this particular railroad is to be subject to any other taxation than one measured by the amount of its net profits?"

(pp. 431, 432) "This plan of tax upon net earnings is quite inconsistent with any other form of taxation, and is absolutely independent of any question as to whether the property thus taxed only upon its profits should have a less or greater value than the capital invested. A tax upon earnings is a tax which at last covers and includes, unless double taxation is intended, all property necessarily held and used to make that income, including the enjoyment of its franchises. *It is not to be presumed, in the light of the public policy of the time, that the State intended that this pioneer railroad should be subjected to any form of taxation of property which produced the taxable income* * * * (Italics ours) We are, therefore of opinion that this property is not subject to any other method of taxation than that of the special system stipulated for by the contract, and that the act of the Georgia Legislature, in so far as it provides for an ad valorem tax upon any part of this invested capital of the Georgia Railroad and Banking Company, does impair the obligation of the contract. But it is said that the tax, so far as imposed upon the franchise of this company, is not in derogation of the charter, and that the decree below should be modified in this particular. *If we are right in construing the tax as one upon net income as a substitute for a property tax, the franchise may no more be taxed than any other property appropriate to the operation of the road. When the State gave up the right to levy*

and collect a property tax and to take in substitution a tax upon the annual net profit, it gave up the right to tax the franchise of the company as certainly as it gave up the right to tax its railroad:" (Italics ours).

The Court, in referring to the tax limitation of the Charter, describes it as (p. 436) *"the immunity from any other tax than one based upon a given per cent. of annual net profits"*. (Italics ours).

V.

This Court has held that this contract inures to the Lessees, of which Appellant is one.

The Charter is an umbrella over the Lessees as well as the Lessor. When the tax of one-half of one per cent is paid on the net income of the Charter tax lines the power of the State to tax is exhausted. We wish to emphasize the fact that the thing which is taxed is the net income yielded by the Charter tax lines, whether that income is made by the operations of the Lessor or Lessees.

The protection of the Lessee is necessary to make good that promised the Lessor. Manifestly if the Lessee is not protected by the Charter the Lessor's ability to rent its property is materially affected. If the State can tax the same net income which has already been taxed under the Charter one-half of one per cent. another 5½% under the Income Tax Act that which is promised the Lessor is denied, although the 5½% tax may be paid by the Lessee, because the Lessee took the lease on the faith of the contract. The State cannot double tax without violating the Charter.

In *Wright v. Louisville & Nashville Railroad Co., et al.*, 236 U.S. 687, which involved the question whether the State could tax the Lessees with the fee of the property, the Court first called attention to the fact that the 12th Section of the Charter of the Georgia Railroad authorized it to rent the whole or any part of its property or to let vehicles of others pass over its railroad, and the Court then said (p. 689) "So that the State has covenanted that the Company's property shall be exempt from tax except upon its income *which it is authorized to make in any of three ways* (Italics ours) * * * For the reasons given in the other case (Wright v. Central of Ga. Ry. Co., 236 U.S. 674), we cannot believe that if the Company saw fit to gain 'the net proceeds of their investments' (to one-half of one percent of which their tax was limited), by letting the whole road instead of allowing others to introduce carriages, *the Statute silently opened the right to resume as against the Lessee all that had been renounced as against the Lessor*" (Italics ours). And again at page 690 the Court said: "If the fee of the roads is taxable to no one while the liability of the Lessor to the above mentioned one-half of one per cent, remains, an attempt to collect a tax upon the fee from the plaintiffs is an attempt on the part of the State to tax the leased property which was completely beyond the reach of its taxing power except in so far as permitted by the contract, the obligations of which could not be impaired without a violation of the contract clause of the Constitution of the United States."

In the companion case of *Wright* v. *Central of Georgia Railway Co.*, 236 U.S. 674, which involved the taxation of the fee of the Augusta and Savannah

and South Western Railroads, to their Lessee, Central of Georgia Railway Company, the Court said (p. 679):

> "The foregoing view of Section 16 would lead us to believe that no change in the matter of tax exemption was expected to follow from the demise of the road, any more than it would have followed from the admission of another carrier to partial rights, or of an individual to carry his own goods. But that is only an introduction to further considerations. We cannot suppose that the Legislature meant either to practice a cunning deception or to make a futile grant. Therefore, we are unable to read the charter as making the exemption vain by reserving to the State an unlimited right to impose upon the Lessee all that it had renounced as against the lessor. For that was to give notice to the parties, if they were supposed to know the law, that the exemption would be lost if the income was earned in one of the contemplated ways—or, if they were supposed ignorant, was to invite them to a bargain that was to have an unexpected and disastrous result."

And again the Court said on pages 679 and 680:

> "We see no ground for believing that there has been any change in the attitude of the State toward the pioneer enterprises that it was encouraging a few years before. We still cannot suppose that it was inviting the lessors to lose the benefit of their exemption or the lessees to find themselves entrapped with a burden made possible only by accepting the invitation of the act * * * We construe those statutes as making the fee exempt from other taxation than that provided for, in favor as well of the lessee as of the lessor—the protection of the lessee being necessary in order to make good that promised to the lessor".

In *Central of Georgia Railway Company* v. *Wright*, 248 U.S. 525, in which the State attempted to tax Central of Georgia Railway Company with its leasehold interest in the Augusta and Savannah Railroad and the South Western Railroad Company, the Supreme Court said (h.n.1):

> "The same reasons which lead this Court to decide that the tax exemptions in the special charters of the Augusta and Savannah and the South Western Railroads inured to the Central of Georgia Railway as their lessee and precluded taxing the latter upon the fee of the leased property (Wright v. Central of Georgia Ry. Co., 236 U.S. 674) invalidate an attempt to evade the charter contracts by a tax of the leasehold interests."

In the body of the opinion the Supreme Court referred to the fact that the previous case in 236 U.S. 674 was an attempt to tax the Lessees with the fee of the two leased lines, and said, (p. 527):

> "The taxes now attempted to be levied are upon the leasehold interests of the Lessee in the same roads and it is argued that, if the leases produce a profit in excess of the rental, the value is required to be taxed by the Constitution of the State. But the Constitution was subsequent to the charters that created the exemption and must yield to them if they apply to the present attempt. We are of opinion that, although the decision in the former case necessarily was confined to the question before the court, the reasoning applies with equal force to that now before us. The cases of Rochester Ry Co. v. Rochester, 205 U.S. 236, and Jetton v. University of the South, 208 U.S. 489, were

urged as opposed to the conclusion reached but were thought not to control in view of the exceptional facts and language that had to be considered, as was recognized in Morris Canal & Banking Co. v. Baird, 239 U.S. 126, 132. We must follow the precedent that was established after full discussion and with recognition of the difficultjes involved."

A re-hearing was granted in *Central of Georgia Railway Co.* v. *Wright,* 249 U.S. 590, as to the South Western Railroad, and in *Central of Ga. Ry. Co.* v. *Wright,* 250 U.S. 519, the decision as to the South Western Railroad in 248 U.S. was re-affirmed.

The decision of the Supreme Court of Georgia in *Wright v. Central of Ga. Ry. Co.,* 146 Ga. 406, which was reversed in *Central of Georgia Ry. Co.* v. *Wright,* 248 U.S. 525, and 250 U.S. 519, set at rest the question that a leasehold interest under the law of Georgia is property in the hands of the Lessee, and under the Constitution of the State of Georgia is taxable to the Lessee. If the Charter is protection to the Lessee against taxing the Lessee with its separate property interests in its leasehold, then why is not the Charter a protection against taxing the Lessee 5½% on the income from the Charter tax lines under the Income Tax Act of March 31, 1931? For the very same reason that the leasehold is protected by the Charter, the income derived from the Charter tax lines covered by the lease is, a fortiori, protected.

The State of Georgia was concluded by the decision in 248 U.S. 525 from attempting to tax the leasehold interest of the Lessees of the Georgia Railroad, because precisely the same questions were involved. So that

the cases in 248 U.S. 525 and 250 U.S. 519 are authority in this case, which was binding on the Supreme Court of the State of Georgia.

The power to lease is embedded in the Georgia Railroad charter, as it is in the Augusta and Savannah charter; and as construed by this Court, the lessees take under the charter, which contemplates that when the net income from the charter tax lines, whether made by the lessor or the lessee, is taxed at ½ of 1%, it is exhaustively taxed and cannot be further taxed either to the lessor or the lessee.

VI.

The Supreme Court of Georgia did not follow the construction put by the Supreme Court of the United States on this and kindred charters.

The decisions of the Supreme Court of the United States construing this particular contract to determine whether subsequent legislation is violative of its provisions in view of the Contract Clause of the Federal Constitution are controlling on the Supreme Court of Georgia. No one doubts this proposition. The Supreme Court of the United States leans to accept the construction of such a charter by the State Courts unless the construction of the State Court is manifestly wrong. But when the Supreme Court has construed such a contract, the Supreme Court of the State is not at liberty to put a different construction on the contract. But that is just what the Supreme Court of Georgia has done in this case. In its opinion in this case the Supreme Court of Georgia says (R. 81):

> "If it be conceded that the charter provision referred to is valid, that the legislative branch of the government had the legal power thus to sur-

render a part of the sovereignty of the State and thereby tie the hands of all future legislatures, in so far as legislating freely upon the question of taxation of this corporation, and if it be conceded that the constitutional inhibition against the inclusion, in the body of the act, of matter different from and foreign to the subject embraced in the caption did not render this act void — *we come, aft[illegible] to the plain provision of the charter which [illegible] with and is confined to the subje[illegible] property tax*, unrelated to the question we [illegible] validity of the corporation for [illegible] an income tax under the existing laws of the State." (Italics ours.)

This misconception by the Georgia Court of the meaning and purpose of the charter contract as it has been interpreted and applied by this Court is the fundamental error in the decision of the Georgia court.

This Court, in *Wright, Comptroller* v. *Georgia R. & Bkg. Co.*, 216 U.S. 420, affirmed the decree of the lower court which had, in its opinion stated (132 Fed. at p. 919):

> "The scheme of taxation provided for this company in its charter is a broad one, and, in my judgment, the tax of one-half of 1 per cent. *on its net earnings embraces all the taxation it was intended should be exacted of this Company.*" (Italics ours).

and, by its decree,

> "ordered, adjudged and decreed that defendant be perpetually enjoined from levying and collecting any taxes, State, County or municipal from said corporation not in accordance with this decree."

This Court, in the first paragraph of its opinion states (216 U.S. at page 422):

> "The court below sustained the contention of the railroad company and held that the scheme of taxation found in the charter of the company was of inviolable obligation, and enjoined any method of taxation conflicting with the stipulations of the charter; from this decree the comptroller has appealed."

This Court affirmed the decree of the lower court and in the course of its opinion said:

> "That the *only* mode of taxation stipulated for after the period of total exemption is a tax upon the *net income* of the company's property is seemingly the plain and obvious meaning of this contract." (216 U.S. at page 426. Italics ours.)

and, again, said

> "It is not to be presumed in the light of the public policy of the time, that the state intended that this pioneer railroad should be subjected to any form of taxation of property which produced the taxable income." (216 U.S. at p. 432.)

Apparently overlooking this decision by this Court, the Georgia court, in its opinion, says:

> "Had it been intended that the corporation as a legal entity should forever be free from any sort or form of taxation except the one-half of one per cent as therein provided, it would have been a simple matter to have so provided and thus to have made clear such an intent."

That such intention was perfectly clear to the Attorney General of Georgia and the other eminent counsel for the Comptroller General of Georgia, is shown in the opinion of *Judge Newman in the case of Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company v. Wright, Comptroller General,* reported in 199 Federal 454, where, after citing the decision reported in 216 U.S. 420, above referred to, the opinion shows that counsel for the Comptroller General stated in their brief:

> "It is conceded by the Comptroller General that at the time the state incorporated the Georgia Railroad and Banking Company the Legislature had the power to make, and did make, a contract with the Georgia Railroad and Banking Company never to tax that company in excess of the rate fixed in the charter, to-wit, one-half of 1 per cent. on its net income, and that so far as that company is concerned that it has an irrevocable contract with the state."

citing the case in 216 U.S. just mentioned.

And in the opnion by Mr. Justice Holmes in *Wright v. Louisville & Nashville R.R. Co.* affirming the lower court, reported in 236 U.S. 687, it is stated:

> "By its charter granted on December 21, 1833, the stock of the company and its branches is *subject only* to a 'tax not exceeding one-half 1 per cent. per annum on the net proceeds of their investments' Sec. 15. This language is interpreted and held to constitute a binding contract in *Wright* v. *Georgia R. & Bkg. Co.*, 216 U.S. 420. So it is admitted that the present tax could not be levied on the lessor." (236 U.S. at p. 688-689). (Italics ours.)

It is submitted that this Court has made it as clear as it could be made by human language that, by intention of the Georgia Legislature, the charter tax is an income tax, that no higher income tax nor any other kind of tax can be assessed against the Lessor as a legal entity, and that by reason of the language of the charter this tax provision inures to the Lessees, and yet we find the Georgia Court, after beginning a paragraph in its opinion with the words:

> "We are not unmindful of certain language of the Federal Courts indicating that those courts regarded the tax referred to in this charter provision as an income tax." (R. 82).

proceeding to hold

> "That section 13 of the charter relates only to a property tax" (R. 83)

and, in the face of these decisions by this Court, to state, at the end of that same paragraph, that Georgia Railroad and Banking Company, in paying year by year the charter tax of one-half of 1 per cent on income

> "**paid the taxes on its property in conformity with the provision of its charter because it recognized its legal obligation for the payment of property taxes upon its own property ****" (R. 84).

It is submitted that a more complete misconception of, or—if it be not a misconception—a more determined refusal to be bound by, the decisions of this Court construing and applying this charter contract, could not be shown.

VII.

The Charter tax is not a property tax. It is an income tax.

Although the Supreme Court of the United States has explicitly decided that the Charter Tax is a tax

on income; that this is the only mode of taxation permitted under the charter; that the income tax exhausts the power of the State to tax; that a franchise tax (which is a property tax) could not be imposed; that additions and betterments could not be taxed or any increase otherwise in the value of the property, the Supreme Court of Georgia has, nevertheless, construed the Charter Tax as a property tax. The decisions of the Supreme Court of the United States construing this charter are authority which the Supreme Court of the State of Georgia is bound to follow. The Supreme Court of Georgia, having arrived at the conclusion that the tax is a property tax, then rests its opinion on Hale v. State Board, 302 U.S. 95. We point out hereafter that the Hale case is inapplicable.

Income may be derived from physical property, or from securities, or from individual effort, or it may be derived from the use of physical property. The income tax imposed by the Georgia Railroad charter contemplated that the Railroad would be worked by someone and that the net proceeds of its operation was the thing which the charter aimed to tax. The fact that the income is made from property does not make the tax thereon a property tax. When the charter of the Georgia Railroad was written, in referring to income, necessarily the income spoken of was the income of particular property. This Court has decided that the income might be made by either the lessor or lessee and that the demise of the railroad did not affect the charter tax.

In the case of *Featherstone* v. *Norman*, 153 S.E. 58; 170 Ga. 370, the Court held that income was not property in the sense in which that term is used in the Consti-

tution of the State, requiring all property to be taxed uniformly. The Court said (at p. 393): "So both the property from which the income comes, and the income itself, are subject to separate assessments for taxation. The two are separate and distinct things. The taxation of one is not the taxation of the other. The assertion that the tax on one is a tax on the other is a fanciful conceit to which we cannot agree." This quotation fits our case. We say it is a fanciful conceit to say that the charter tax of ½ of 1% is a property tax and not an income tax.

In *Wright* v. *Georgia Railroad & Banking Company*, 216 U.S. 420, this Court, after deciding explicitly that the property of the Georgia Railroad was exempt from taxation, and that the only method of taxation under the charter was a tax on net income, said (at p. 432): "If we are right in construing the tax as one upon net income as a substitute for a property tax, the franchise may no more be taxed than any other property appropriate to the operation of the road. When the State gave up the right to levy and collect a property tax and to take in substitution a tax upon the annual net profit, it gave up the right to tax the franchise of the Company as certainly as it gave up the right to tax its railroad."

The Supreme Court of Georgia in its opinion in this case quoted the first of the two sentences quoted above from this Court's opinion in 216 U.S., and follows this quotation with this statement: "It is obvious from the language of the Supreme Court, just quoted, that the only question then being considered by that Court was whether or not the property of the Railroad could be further taxed". This decision of the Supreme

Court of Georgia is a palpable misconstruction of the decision of the Supreme Court of the United States. The Supreme Court of the United States in 216 U.S. definitely and unequivocally decided that the property was exempt from taxation under the charter, and that the only form of taxation permissible under the charter was a tax limited to one-half of 1% on the net income, and that this tax was exhaustive of the power of the State to tax.

If the Charter tax on income is a substitute for a property tax, then it clearly is not a property tax. It could not at the same time be a property tax and a substitute for a property tax.

As we have further pointed out, the tax is not levied on the net earnings of the Lessor (i.e., the rentals), but is levied on the net earnings from the operation of the lines which are covered by the tax limitation of the Charter. The tax has no relation whatever to the value of the property but is, as it has been construed for 100 years, a tax on the net earnings of these particular lines, irrespective whether the earnings are made by the Lessor or the Lessee.

In *State* v. *Western and Atlantic R.R. Co.*, 136 Ga. 619, the Court calls attention to the Act of the Legislature of Georgia authorizing the lease of the road, which act provided that the Lessee or Lessees should pay "tax upon *their income* as is now paid by Central Railroad & Banking Company". (p. 620). The Court also refers to the tax as an "income tax" at page 625, and also in the first head note. The income tax provided by the Charter of Central Railroad & Banking Company (Sec. 18 Act of 1835, p. 217) is identical with the income tax under the Georgia Railroad Charter.

There is a long line of cases decided by this Court which hold that a franchise or privilege tax may be *measured* by the entire income, although some of the income is derived from non-taxable property, as, for instance, *Flint* v. *Stone Tracy Co.*, 220 U.S. 108; *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Mass.*, 6 Wall. 611; *Home Ins. Co.*, v. *New York*, 134 U.S., 594; *Pacific Co.* v. *Johnson*, 285 U.S. 481.

But in this case the Charter contract protects the income from the charter tax lines from being taxed more than one-half of one per cent per annum and the exemption runs in favor of the Lessee as well as of the Lessor.

We argue hereafter that, whether the Charter tax is called a property tax or an income tax, the tax imposed on the Lessee in this case violates the charter.

VIII.

Income taxes were habitually levied on railroads in Georgia until the Act of 1874; and there is no room for the interpretation of the Supreme Court of Georgia that the Charter tax was a property tax.

The Supreme Court of Georgia first reaches the conclusion that this charter tax is a property tax (a conclusion which is contrary to the interpretation put on the charter by the Supreme Court of the United States). Then the Supreme Court of Georgia states (R. 82) "A number of railroad charters existing at the time or subsequently granted, contained similar provisions for taxation, but there existed in this State at that time no general law providing for income taxes. It was almost a century thereafter before the Legislature enacted our present income tax statute". From

these premises the Supreme Court of Georgia draws the final conclusion that as the tax was a property tax, and that at the time income taxes were not known in the law of Georgia, that, therefore, it cannot be presumed that the State of Georgia intended to exempt either the lessor or lessee from income taxes. On these erroneous premises the Supreme Court of Georgia brings the case within the orbit of the Hale case.

We have already, we think, demonstrated the proposition that this charter tax was not a property tax. We submit in Appendix III to this brief a list of the railroads which had tax limitations in their charters of one-half of one per cent on their net income. The State of Georgia did not make the tax inadvisedly a tax on income. It obviously intended that these railroads should all of them be taxed on their income.

The Constitution of Georgia of 1798 was the Constitution in effect when this Charter was passed. There was no provision in this Constitution or in any subsequent Constitution of the State of Georgia until 1868 as to uniformity of taxation; nor was there any requirement that property should be taxed ad valorem or in any other particular manner, and under these old Constitutions various kinds of taxes were imposed in Georgia, even real estate was not taxed uniformly. A general income tax act was passed to cover the period from April 1, 1862, to April 1, 1863 (Acts 1863, p. 176), and another general income tax act was passed covering the period April 1, 1863, to April 1, 1864 (Acts, Extra Session 1864, p. 80). These Acts were repealed by Section VII of the Act of December 15, 1866, (Acts 1866, p. 166).

In 1833 railroads were a new species of property and in the case of the first railroads which were chartered in Georgia, the State granted them special charters under which they were to be taxed one-half of one per cent on their net incomes. Other railroads incorporated under the laws of Georgia had no special charter tax limtation; but, nevertheless, until 1874 all railroads in Georgia were habitually taxed one-half of one per cent on their net income. We have attached to this brief Appendix II which contains extracts from the various acts taxing railroads in the State of Georgia and under substantially all of these acts, all railroads were taxed one-half of one per cent on their net earnings. It cannot be argued that the taxes imposed by these Acts recited in Appendix II are property taxes. They are income taxes. In one or two instances recited in Appendix II the State departed from its practice of taxing railroads on income and taxed them on the basis of the value of their property. But, generally speaking, the method of taxation down to 1874 was the income basis. The Act of February 28, 1874, (Acts 1874, p. 107) repealed the Income Tax Acts and provided that thereafter the railroads should be taxed on the value of their property "as other property of the people of the State" is taxed.

The decision of the Supreme Court of Georgia (R. 84) refers to the decision of *Mayor, etc., of Savannah* v. *Hartridge*, 8 Ga. 23, which draws a distinction between income taxes and property taxes. This case arose in 1849. At this time, although several railroads had been chartered previously there were none of them in operation, and the first general act in Georgia on the subject of taxation of railroads, is the Act referred to in Appendix II as the Act of February 1, 1850

(Acts 1850, p. 378) which mentions only three railroads—the Georgia Railroad, the Central Railroad, and the Macon and Western Railroad; two of which had charter tax limitations of one-half of one per cent on their net income, and the third did not. The question in the case of Savannah v. Hartridge, 8 Ga. 23, was whether the charter of the City of Savannah was broad enough to authorize it to impose income taxes.

The Supreme Court of Georgia in its opinion in the case at bar, says (R. 85), referring to the decision of the Supreme Court of Georgia in 8 Ga. 23: "While that decision was rendered several years after the enactment of the Charter here involved, it must be assumed that the Legislature, when enacting this Charter, was acquainted with the fact as there recited that 'writers on political economy as well as the tax laws of all governments', thus divided the forms of taxation and adhered to the rule that where one or more of the forms of taxation are treated or acted upon the other is never intended".

Indulging the presumption (as the Supreme Court of Georgia says we may) that the Legislature of Georgia when it granted this charter knew the distinction between income taxes and property taxes, the Legislature carefully and specifically laid the tax on net income. It definitely intended, as to this new species of property, an income tax and not a property tax, and over a series of succeeding years it taxed all railroad companies one-half of one per cent on their net earnings, until 1874 when it reversed its policy and thereafter provided that they should be taxed on value of their property "as other property of the people of the State". That the Legislature intended to impose

an "income tax" when it granted this charter and not a "property tax" is not susceptible of any doubt, and the Supreme Court of the United States in construing this charter has repeatedly so held.

IX.

It makes no difference whether the Charter Tax is called by the Court below a Property Tax or an Income Tax. In either event the Charter is impaired by taxing the net income from the Charter tax lines to the Lessor or the Lessees at 5½% under the Income Tax Act of 1931.

We have demonstrated that under the Charter the property is exempt from taxation, that the income under the Charter cannot be taxed higher than ½ of 1%, that the Charter inures to the Lessees, that the leasehold interest of the Lessees cannot be taxed to the Lessees without violating the Charter, and that all of these questions have been definitely decided by this Court. We maintain that it logically and necessarily follows that the net income from the Charter tax lines cannot be further taxed 5½% to the Lessees without violating the Charter.

Just why it should violate the Charter to tax the leasehold interest to the Lessees and not violate the Charter to tax to the Lessees the income from the leasehold is impossible to explain. It does not make any difference whether the tax levied under the Charter is defined as a property tax or an income tax, the impairment of the Charter is the same in substance, kind and extent.

We understand, of course, that a person can be taxed on his property and at the same time taxed on the income from the same property, and that although this may be double taxation, that it is legally permissible,

because there is no statute or constitutional provision against double taxation. But here we are dealing with a contract. The State cannot tax the Georgia Railroad ½ of 1% under the Charter and then tax the Georgia Railroad 5½% in addition under the Income Tax Act of 1931. The Charter prohibits a tax *higher* than ½ of 1%. (132 Fed., 912, 915).

If we are right in the proposition that the Charter tax provision inures to the Lessees (as has been decided by this Court), then it makes no difference whether the Charter tax is a property tax or an income tax, because the result is that the net income under the Charter, whether earned by the Lessor or the Lessees can not be taxed higher than ½ of 1%.

X.

Rochester Railway v. Rochester, 205 U. S. 236, and kindred cases, distinguished.

There is no transfer or assignment of the property in this case; it is merely a case of lease authorized by the Charter.

The Supreme Court of the United States has held in the cases hereinbefore cited, that under the peculiar provisions of these Georgia Charters granting tax limitations, the demise of the railroads to the lessees did not affect the charter limitations, and that they inured to the lessees, and in its opinions distinguished the cases of:

Rochester Ry. v. *Rochester*, 205 U.S. 236.
Jetton v. *University of the South*, 208 U.S. 489.
Morris Canal Co. v. *Baird*, 239 U.S. 126.

The Rochester case and the Morris Canal Company case both decided that the grant of immunity from taxation was personal to the owner of the property to

whom the immunity was granted, and the immunity could not be transferred. The Supreme Court in *Wright* v. *Louisville & Nashville R.R. et al.*, 236 U.S. 687, 690, (which involved the taxation of the Georgia Railroad to the Lessees), said:

> "Thus the particular features of the case in hand take it without the rule applied in Rochester Railway v. Rochester, 205 U.S. 236, and other kindred cases, from which we have no purpose to depart."

In *Central of Georgia Railway Company* v. *Wright*, 248 U.S. 525, 526 (which was a case which involved taxing the leasehold interests of the Central in the Augusta and Savannah and the South Western Railroads), the Court said:

> "The cases of Rochester Ry. Co. v. Rochester, 205 U.S. 236, and Jetton v. University of the South, 208 U.S. 489, were urged as opposed to the conclusion reached but were thought not to control in view of the exceptional facts and language that had to be considered, as was recognized in Morris Canal & Banking Co. v. Baird, 239 U.S. 126, 132."

In *Morris Canal Co.* v. *Baird*, 239 U.S. 126, 132, the Court said, after citing the case of *Rochester Ry. Co.* v. *Rochester*, 205 U.S. 236:

> "The results in Wright v. Central of Georgia Ry., 236 U.S. 674, and Wright v. Louisville & Nashville R.R. Co., 236 U.S. 687, 690, were based upon the original charters, which were interpreted as contemplating and permitting subsequent transfers without subjecting the fee to taxation. Neither of these cases modifies the principles announced and applied in the opinion quoted from above—it is referred to with approval in the latter of them."

The fact that the Supreme Court of the United States in the case in 248 U.S. 525 held that the case of *Jetton* v. *University of the South*, 208 U.S. 489, was not controlling, is significant. In the University of the South case, the exemption from taxation was "as long as said lands belong to said University". The University leased the lands and it was held that the leasehold interest was taxable to the Lessee as property separate and distinct from the fee of the University, which was still protected by the Charter exemption. In the case at bar, as in the case of Central of Georgia Railway Company, decided in 248 U.S. 525, the tax limitation protected the Lessee as well as the Company which owned the railroad, because all interest in the property was taxed when the Charter rate was paid on the net income, the power of the State being exhausted.

XI.

The Contract is impaired if its value is diminished or if it is affected at all.

> "One of the tests that a contract has been impaired is that its value has by legislation been diminished. The applicable section of the Constitution of the United States provides that the contract shall not be impaired at all. It is not a question of degree, manner, or cause, but one of whether the subsequent legislation of the state encroaches in any respect on the obligation of the contract or dispenses with any part of its force."
>
> *Norfolk & W. Ry. Co.* v. *Boyle*, 12 F. Supp. 522, 523.

> "The amount of the impairment of the obligation is immaterial. If there be any, it is sufficient to bring into activity the constitutional provision

and the judicial power of this Court to redress the wrong."

Farrington v. *Tennessee*, 95 U.S. 679, 683.

"The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden. In Green v. Biddle (8 Wheaton 84), it was said: 'The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its term by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation."

Van Hoffman v. *City of Quincy* 4 Wall, 535, 552, 553.

"The objection to a law, on the ground that it impairs the obligation of a contract, does not depend upon the extent of the change which the law may make in it." (h.n.2).

"Any deviation from its terms, by imposing conditions not expressed in the contract, however minute, and apparently immaterial in their effect, is within this constitutional prohibition." (h.n.3).

Winter v. *Jones*, 10 Ga. 190.

XII.

The case of Hale v. State Board, 302 U.S. 95, distinguished

This is the case on which the Supreme Court mainly rests its decision. It is wholly unlike the case at bar.

In the Hale case, under the Statutes of Iowa certain bonds were exempt from taxation and the Court assumed that the Statutes constituted a contract. The Supreme Court of Iowa construing these Statutes held

that the bonds were exempt, but that the income on the bonds was not exempt because at the time the Statutes were passed there was no general income tax law in Iowa. The Supreme Court of the United States elected to follow the decision of the Supreme Court of Iowa, although it was not bound to do so. The same argument cannot be made in the case at bar, because under the Georgia Railroad Charter the tax is specifically an income tax and the Supreme Court of the United States has held that under the Georgia Railroad Charter the property is exempt from tax. The Supreme Court of the United States has also held that no other mode or method of taxation, except the income tax, can be imposed under this Charter, and as no higher tax than one-half of 1% can be imposed, this tax when imposed is exhaustive of the power of the State.

While there was no general income tax statute in Georgia when this Charter was passed, the Legislature, as the Supreme Court of Georgia has said, must be presumed to have been familiar with the general subject. Certainly it would be a violent assumption to suppose that the Legislature imposed the income tax in ignorance of what it was doing.

Moreover, all railroad companies in Georgia were habitually taxed ½ of 1% on their net income, whether they had a charter contract or not, until 1874, when the method of taxing railroads was changed to a tax on their property ad valorem.

If in the Hale case the holders of the bonds *had been* taxed under a Statute of Iowa one-half of 1 per cent on the income of the bonds, and if this statute had been held to be a contract covering the whole liability

for taxation, an additional tax of 5½% could not have been imposed under a subsequent general income tax act. That is exactly the case here.

In *Wright* v. *Georgia Railroad & Bkg. Co.*, 216 U.S. 420, the State was seeking to tax the Georgia Railroad under a Franchise Tax Act which was passed in 1902 (Acts 1902, p. 37). There never had been any franchise tax in Georgia before this. In 54 Lawyers' Co-Operative Ed. p. 548, where this case is reported, the argument of John C. Hart and Samuel H. Sibley, representing Comptroller General Wright, is quoted as follows: "The fact that a franchise had never been taxed when the stipulations were made may explain why no agreement was made respecting it, but does not operate to hinder bringing within the power of taxation the new subject matter". The Supreme Court of the United States brushed this agrument aside, and adopted the argument of Mr. Joseph R. Lamar (subsequently one of the Justices of this Court), Counsel for the Georgia Railroad and Banking Company, quoted in 54 Lawyers' Co-Operative Ed. at p. 550 as follows: "The provision that the stock should be subject to an income tax not exceeding one-half of 1% on the net profits, by necessary implication prohibited any other subject or method of taxation." If the new franchise tax could not be imposed without violating the Charter, a fortiori, the new income tax of 1931 cannot be imposed without violating the Charter.

But, as we have argued elsewhere in this brief, it makes no difference whether the Charter tax is a property tax or an income tax, the tax having been imposed under the Charter up to the maximum, no other or additional tax whatever it may be called, can be imposed.

XIII

Other cases cited by the Supreme Court of Georgia and by Appellee, distinguished.

Clyde v. *Gilchrist*, 262 U.S. 94.

Adams Mfg. Co. v. *Storen*, 304 U.S. 307.

These two cases are similar to the case of *Hale* v. *State Board*, 302 U.S. 95, and are inapplicable for the same reasons set forth in the preceding point, which distinguishes that case.

Ex rel. *Cohn* v. *Graves*, 300 U.S. 308.

This case decides that "a State may tax her citizen upon the income he receives by way of rents from lands situate in another State and by way of interest on bonds secured by mortgage on lands situate in another State"; and it also decides that "a tax on the income from land is not a tax on the land". The first proposition is irrelevant and the last proposition supports our argument that the tax in this case is not a property tax.

Mason Co. v. *Tax Com. of Washington*, 302 U.S. 186.

This case merely decides that "a State Occupation Tax on gross receipts may constitutionally include the receipts from construction work done under a contract with the United States". There were only two questions in this case—one, whether the tax imposes an unconstitutional burden upon the Federal Government; and the other was, whether the area in which the work was performed was within the exclusive jurisdiction of the United States. This case does not seem to touch the case at bar.

Adams v. *Saenger*, 303 U.S. 59.

This case involved a question of what effect should be given in one State to the judgment of another State. The citation was probably a mistake.

Helvering v. *Bankline Oil Co.*, 303 U.S. 362.

Graves v. *O'Keefe*, 306 U.S. 466.

The first case involved the question whether a Federal tax on the profits from land leased from the State was invalid as an unconstitutional burden on a State instrumentality, and the second case involved the question whether the State of New York could tax the salary of a New York resident earned as Attorney for the Federal Home Owners Loan Corporation, which was a Federal instrumentality. These cases do not seem to remotely touch the case at bar.

New York Rapid Transit Corp. v. *State of N. Y.*, 303 U.S. 573.

In this case a privilege tax of 3% on gross income was imposed on the New York Rapid Transit Corporation. The question was whether this tax violated the contract of this corporation with the City of New York. The Court said on page 590: "We searched in vain for any provision in the contract which expressly exempts the corporation from the payment of this tax or indeed any tax", and again on page 591 the Court said "Not only is the corporation unable to point to an unmistakable exemption, but the contract itself contains an express provision permitting the deduction of taxes from the gross receipts".

U. S. Trust Co. v. Helvering, 307 U.S. 57.

This case is wholly irrelevant. The only question in the case was whether the proceeds of a war risk insurance policy payable to a soldier's widow should be included as a part of the soldier's gross estate for purposes of Federal estate taxes.

CONCLUSION.

For the reasons given above, it is believed that the decision of the Supreme Court of Georgia in this case should be reversed by this Court.

Respectfully submitted,

CARL H. DAVIS
(Wilmington, N. C.)

PHILIP H. ALSTON
(Atlanta, Ga.)

T. M. CUNNINGHAM,
(Savannah, Ga.)

Attorneys for Atlantic Coast Line Railroad Company.

December 26, 1946.

APPENDIX I

Extract from Sections 12 and 14 of Charter of Georgia Railroad Company (Acts 1833 pp. 262, 263).

Sec. 12 * * * "that the said company may, when they see fit, rent or farm out all or any part of their said exclusive right of transportation or conveyance of persons on the rail-road or rail-roads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon, subject to the rates above mentioned. And the said company, in the exercise of their right of carriage or transportation of persons or property, or the persons so taking from the company the right of transportation or conveyance, shall, so far as they act on the same, be regarded as common carriers." * * *

Sec. 14 * * * "That whenever the company aforesaid shall see fit to farm out as aforesaid, to any person or persons, or body corporate, any part of their exclusive right of conveyance and transportation, or shall deem it expedient to open the said road or any part thereof, to public use, they shall and may adopt and enforce all necessary rules and regulations, and have power to prescribe the construction and size or burthen of all carriages and vehicles, and the materials of which such shall be made, that shall be permitted to be used or pass on the said rail road, and the locomotive power that shall be used with them." * * *

APPENDIX II

Acts of the Legislature of Georgia imposing Income Taxes on railroads.

The first mentioned of any tax on railroads in Georgia outside of the tax limitations which were conferred on railroads in their special charters (see Appendix III), is the Act of February 1, 1850 (Acts 1850, p. 378). At this time there were evidently only three railroads in operation in the State of Georgia — the Georgia Railroad, the Central Railroad, and the Macon and Western Railroad. The first two named had tax limitations in their charters, under which they were taxed one-half of 1% on their net income. The Macon and Western Railroad had no tax limitation. Section I of the Act provides that the President of the Georgia Railroad shall pay a tax for the year 1850 "one-half of one percent. on the net annual income of the stock of said road and its branches". Section II provides that the increase of the capital of the Georgia Railroad authorized "by the act of the present session of the General Assembly, be and the same is hereby taxed thirty-one and one-quarter cents on every hundred dollars worth". Section III provides that the Central Railroad shall pay a tax "one-half of one percent on its net annual income". Section IV provides that the Macon and Western Railroad shall pay a tax of thirty-one and one-quarter cents on each one hundred dollars of the amount of stock actually paid in. Section V of the Act provides that the banking capital of the Georgia Railroad and the Central Railroad shall not be exempt from future taxation "and the tax on net profits shall only be on the net profits of the Railroad".

Section VIII of the Act of December 11, 1858. (Acts 1858, p. 105) provides: "That the several Rail-

road Companies in this State, now, or that may hereafter be in operation, are hereby required, to make their returns to, and pay to the State Treasurer, in each year, on or before the 31st December, one-half of one percent., upon their net annual income of said Railroads".

Section V of the Act of December 14, 1861, (Acts 1861, p. 81) provides "That so much of the 646th and 647th sections of the Code as relates to the tax on Railroads, be repealed; and that in lieu of the same, the 8th section of An Act assented to December 11, 1858, taxing all Railroad Companies one-half of one percent. upon their net annual income, be continued in force".

The Code referred to in the Act last above stated is the Code which went into effect January 1, 1863, but was published in 1861. The sections of the Code which were repealed by the above stated Act of December 14, 1861, are mistakenly referred to in the Act of 1861 as Sections 646 and 647. The correct reference is 746 and 748. Section 746 provides "The several railroads and other incorporated or unincorporated companies of every kind, except banks, which are not exempt by their charter or otherwise, or for which there is not a different met od of taxation specially prescribed, pay the same rate percent. upon the whole amount of their capital stock paid in as is levied on other capital, together with the same rate percent. upon their net annual profits". Section 748 provides "The several railroads, by whose charters a higher tax is forbidden, and such as are now, or may hereafter be in operation, that do not pay a dividend exceeding six per cent., shall pay only one-half of one percent. upon the net annual income of each, until they

pay a dividend of eight percent. per annum, in which shall be included the reserved fund, at which time they are to be taxed as other capital".

There does not appear to be any Act of the Legislature from which Sections 746 and 748 of the Code were codified.

Section III of the Act of December 15, 1866, (Acts 1866, p. 165) provides: "That all national banks, railroad companies in operation whose charters do not forbid so high a tax, all express companies and insurance companies incorporated by the laws of this State, shall pay an annual tax of one-half of one percent. on their capital stock. Section VII of this Act of December 15, 1866 (Acts 1866, p. 166) provides "That all laws heretofore passed levying and collecting a tax upon income, be, and the same are hereby repealed."

Section I of the Act of September 28, 1868, (Acts 1868, p. 143) provides "That so much of the third section of the act approved December 15, 1866, as relates to the taxing certain railroad companies fifty cents on the one hundred dollars on their capital stock be, and the same is hereby, repealed, and that for the year 1867 the Comptroller General is directed to collect only such a percent. tax on the net earnings of the Atlanta and West Point and Macon and Western Railroads as is collected of the Central Railroad, the Georgia Railroad, the South Western Railroad, the Muscogee Railroad, the Brunswick and Florida Railroad, the Savannah and Albany Railroad, the Augusta and Savannah Railroad and the Milledgeville Railroads".

Section III of the Act of October 5, 1868 (Acts 1868, p. 154) provides "That all railroad companies,

incorporated in this State, shall pay an annual tax of one-half of one percent. on their net earnings".

Section 3 of the Act of March 18, 1869 (Acts 1869, p. 160) provides "That all railroad companies incorporated in this State shall pay an annual tax of one-half of one percent. on their net earnings".

Section III of the Act of January 19, 1872, (Acts 1872, p. 276) provides "That all railroad companies incorporated in this State shall pay an annual tax of one-half of one percent. on their net earning". Section VII of the same Act provides "That there shall be no tax on income other than that provided by Sections three and four".

Section III of the Act of February 20, 1873, (Acts 1873, p. 65) provides "That all railroad companies incorporated in this State shall pay an annual tax of one percent. on their net earnings".

Section III of the Act of February 26, 1874 (Acts 1874, p. 103) provides "That all railroad companies incorporated in this State shall pay an annual tax of one-half of one percent. on their net earnings".

The Act of February 28, 1874, (Acts 1874, p. 107) provided that from and after its passage all railroad companies in the State should be required to pay taxes on the value of their property. The title of this Act states that it is "to repeal so much of the charters of such companies, respectively, as may conflict with the provisions of this Act"; but nothing is said in the body of the Act about repeal of the charters of such companies. This is the Act which brought on all the litigation which subsequently ensued over the tax limitations of these railroad charters.

APPENDIX III.

Railroads Incorporated by the General Assembly of the State of Georgia which had a tax limitation in their charters of one-half of one per cent. on the net income.

Central Railroad and Banking Company of Georgia, Section 18, Act of December 14, 1835, p. 217. (This Company was originally chartered under the name of Central Railroad and Canal Company, Act December 20, 1833, p. 246).

Georgia Railroad Company, Act December 21, 1833, Sec. 15 (Name changed to Georgia Railroad & Banking Company, Act December 18, 1835, p. 181).

Brunswick & Florida Railroad Company, Act of 1835, Sec. 12, p. 192.

Chattahoochee Railroad Company, Act of December 21, 1835, Sec. 7, p. 193. (Name changed to Chattahoochee Railroad & Banking Company, Act December 30, 1836).

Louisville Railroad Company, Act December 29, 1838, Sec. 7, p. 170.

Augusta & Waynesboro Railroad, Act December 31, 1838, Sec. 13, p. 174. (Name changed to Augusta & Savannah Railroad, Act February 16, 1856, p. 185).

Talbotton Railroad Company, Act January 1, 1839, Sec. 14, p. 181.

Eatonton Railroad Company, Act January 1, 1838, Sec. 1, p. 191.

Muscogee Railroad Company, Act of December 27, 1845, Sec. 5, p. 116.

South Western Railroad Company, Act December 27, 1845, Sec. 14, p. 132.

Madison & Macon Railroad Company, Act December 29, 1847, Sec. 3, p. 173.

Columbus & West Point Railroad & Plank Road Company, Act January 22, 1852, Sec. 5, p. 133. (The Act of February 18, 1854, p. 415, to revive the charter of this company, took away the tax limitation.)

Atlantic & Gulf Railroad Company, Act February 27, 1856, Sec. 4, p. 158.

Macon & Brunswick Railroad Company, Act March 1, 1856, Sec. 3, p. 181.

Macon & Brunswick Railroad Company, Act December 17, 1857, Sec. IV, p. 71.

Milledgeville & Gordon Railroad Company & Eatonton Branch Railroad Company, Act December 13, 1859, p. 316. (Consolidated with Central Railroad & Banking Co. of Georgia and became a part thereof and subject to its charter).

Georgia Air Line Railroad Company, Act March 5, 1856, Sec. 4, p. 165.

There were a number of railroad companies chartered after January 1, 1863, which contained tax limitations in their charters, but charters granted after January 1, 1863 were revocable because the Code of Georgia which became effective January 1, 1863 provided, Sec. 1636, "In all cases of private charters hereafter granted the State reserves the right to withdraw the franchise unless such right is expressly negatived in the charter."

There were a number of railroad companies chartered prior to January 1, 1863 whose charters contained no tax limitation.

FILE COPY

AUG 10 1946

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 385

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant,

vs.

M. E. THOMPSON, STATE REVENUE COMMISSIONER OF THE STATE OF GEORGIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

EUGENE COOK,
Attorney General of Georgia,
CLAUDE SHAW,
C. E. GREGORY, JR.,
VICTOR DAVIDSON,
Assistant Attorneys General of Georgia,
Counsel for Appellee.

INDEX

Subject Index

Page

Statement opposing jurisdiction and motion to dismiss or affirm 1

Table of Cases Cited

Atkinson v. *Tax Commissioner of Oregon*, 303 U. S. 20, 59 Sup. Ct. 595 8

Central of Georgia Railway Co. v. *Wright*, 248 U. S. 525, 250 U. S. 519 4

Graves v. *New York*, 306 U. S. 466, 59 Sup. Ct. 595 9

Hale v. *Iowa State Board of Assessment and Review*, 302 U. S. 95, 58 Sup. Ct. 102 5

Helvering v. *Bankline Oil Co.*, 303 U. S. 62, 58 Sup. Ct. 616 8

Helvering v. *Mountain Producers Corp.*, 302 U. S. 376, 58 Sup. Ct. 623 8

J. D. Adams Mfg. Co. v. *Storen*, 304 U. S. 307, 58 Sup. Ct. 915 4

Louisville and Nashville Railroad Co., et al. v. *Wright*, 236 U. S. 687 3

New York Rapid Transit Corp. v. *State of New York*, 303 U. S. 573, 58 Sup. Ct. 721 9

Silas Mason Co. v. *Tax Commissioner of the State of Washington*, 302 U. S. 186, 59 Sup. Ct. 233 8

United States Trust Co. v. *Helvering*, 307 U. S. 57, 59 Sup. Ct. 692 8

Wright v. *Central of Georgia Railway Co.*, 236 U. S. 674 4

Wright v. *Georgia Railroad and Banking Co.*, 216 U. S. 420 4

Wright v. *Louisville & Nashville R. R. Co.*, 236 U. S. 687 4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 385

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant,

vs.

M. E. THOMPSON, STATE REVENUE COMMISSIONER OF THE STATE OF GEORGIA,
Appellee.

APPELLEE'S STATEMENT AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellee, M. E. THOMPSON, State Revenue Commissioner of the State of Georgia, believing that the matter set forth below will demonstrate the lack of substance in the questions raised by this appeal, files this, his statement, in opposition of appellant's statement as to the jurisdiction. Appellee includes herein his motion to dismiss the appeal, or in the alternative, to affirm the judgment of the Supreme Court of Georgia on the ground that the questions raised on behalf of appellant are so unsubstantial as not to need further argument.

Appellee asserts that the unsubstantial character of the grounds stated by appellant is so apparent on the face of

the record as to warrant the court in summarily disposing of the case at this stage of the proceedings.

The matters here relied on by appellee are more particularly stated below.

I

Appellant bases its appeal on the erroneous assumption that there is a contract between the State of Georgia and the Atlantic Coast Line Railroad Company whereby the State has exempted the income of said appellant earned in the operation of a certain railroad and that the income tax act of 1931, as enforced by the disposition of the Supreme Court of Georgia, impairs the obligation of this contract.

Before the Supreme Court of the United States would have jurisdiction of the foregoing, it would have to appear

(a) That there was a contract between the State of Georgia and the appellant, or

(b) that there was a contract between the State of Georgia and some person in privity with the appellant whereby the appellant was entitled to an exemption from income taxes on income earned by this particular railroad.

The record shows no evidence of a contract of any kind between the State of Georgia and the appellant. Neither does the record show any contract for the exemption of income taxes of either the appellant or any person in privity with the appellant.

Appellant, the Atlantic Coast Line Railroad Company, is a mere tenant of the Georgia Railroad and Banking Company. This was so held in the decree of the court in the case of *Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company* v. *William A. Wright*, comptroller-general, this being the same case re-

ferred to in paragraph four in the assignment of error of plaintiff in the 236 U. S. 687, the decree being as follows:

"Considered, adjudged and decreed as follows:

1. That the lease executed by the Georgia Railroad & Banking Company to William M. Wadley, exhibited to the bill of complaint in this cause of which the complainants are assignees under said Wadley, created the relation of landlord and tenant between the parties thereto and did not vest in said lessees any estate, but only an usufruct, which is not subject to be taxed to said lessees, and that the property covered thereby, with its renewals, alterations and betterments made by the lessee is not subject to *ad valorem* taxation."

This case emphasizes the fact that the only contract that was made was between the State of Georgia and the Georgia Railroad and Banking Company. The income claimed to be exempt was earned by defendant through the employment of its capital, the employment of labor, expert management, the correlating of its other railroads with this particular railroad, and lastly by the use of the property of the Georgia Railroad, which, as tenant, it has operated.

The charter of the Georgia Railroad and Banking Company contains no contract for the exemption from income taxes of either the appellant or its landlord, the Georgia Railroad and Banking Company.

The record shows that there was no contract with the Georgia Railroad and Banking Company, appellant's landlord, for the exemption of any income taxes either to the landlord or to any tenant of the landlord. Section 15 relied on as being a contract for the exemption of income taxes reads as follows: "The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the comple-

tion of the said railroads or any one of them; and after that, shall be subject to a tax not exceeding one-half per cent per annum on the net proceeds of their investments."

The Supreme Court of the United States in the case of *Wright* v. *Georgia Railroad and Banking Company*, 216 U. S. 420, construed this as a property tax based on net profits. We quote headnote 5 of this decision: "A tax upon the franchise of a railway company impairs the obligation of a charter exemption from any property tax other than one based on its net profits."

No Federal questions are involved in the assignments of error by appellant because the Supreme Court of Georgia did not follow the decisions of the United States Supreme Court in the cases of *Wright* v. *Georgia Railroad and Banking Company*, 216 U. S. 420; *Wright* v. *Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company*, 236 U. S. 687; *Wright* v. *Central of Georgia Railway Company*, 236 U. S. 674; *Central of Georgia Railway Company* v. *Wright*, 248 U. S. 525; 250 U. S. 519. All of these cases involve the question of property taxes. The State of Georgia during this period of time did not even levy a general income tax.

Wherefore there being no Federal question involved in this case, no contract from the State of Georgia with the Atlantic Coast Line Railroad Company, nor any contract for the exemption of income taxes of appellant, the appeal should be dismissed.

2

If, for any reason, the appeal is not dismissed the judgment of the Supreme Court of Georgia should be affirmed because the questions raised on behalf of appellant are so unsubstantial as to need no further argument. The issues raised by appellant have already been determined by the

Supreme Court of the United States in numerous decisions, and hence an appeal on these grounds which have already been determined by the United States Supreme Court are so unsubstantial a character as to justify this court in affirming the judgment of the Supreme Court of Georgia at this stage of the proceedings.

The issue involved in this case is whether income from tax exempt property is exempt from the payment of income taxes.

Prior to 1937 the United States Supreme Court held that income from the exempt property was also exempt. Since 1937 the United States Supreme Court has consistently held that income from tax exempt property is not exempt from the payment of income tax. During that year the case of *Hale v. Iowa State Board of Assessment and Review*, 302 U. S. 95, 58 Sup. Ct. 102, came up before this court. The ruling in this case is so overwhelming that it should be a complete answer in the affirmative as to whether the Supreme Court of Georgia was correct in holding that the income earned by appellant from the operation of the Georgia Railroad was taxable.

The question in the *Hale* case was whether the interest upon bonds of the State of Iowa, or its political subdivisions, could be included in an assessment of a tax on the net income of the owners without detracting from earlier exemptions in respect to taxes upon property and without an unconstitutional impairment of the obligation of a contract.

In that case, the taxpayer, a resident of Iowa, owned bonds issued by Iowa School Districts, Iowa Road Bonds, Iowa County Bonds and Iowa Soldiers' Bonus bonds. At the time these bonds were issued the statute provided that such bonds "are not to be taxed" or "shall be exempt from taxation." At the time Iowa had no income tax, just as

Georgia levied no income tax in 1833. Later Iowa imposted an income tax, just as Georgia did, and an attempt was made to tax the income derived from the interest of these bonds. The taxpayer pleaded the impairment of the obligation of the contract of exemption. The Supreme Court of Iowa upheld the assessment and interpreted the contracts as limited to taxes laid directly upon property in proportion to its value and not as touching taxes in the nature of an exercise on the net income of the owner.

This case was carried to the United States Supreme Court by appeal. For the convenience of the court, we quote the material headnotes of this case and also portions of the opinion:

"2. The Supreme Court leans toward agreement with State courts and accepts their judgment as to whether State statute impairs obligation of contract unless manifestly wrong.

"4. Grants of immunity from taxation, in derogation of sovereign power of the State, are strictly construed.

"5. Even if Iowa statute exempting bonds of State of Iowa and its political subdivisions from taxation created a contract, determination of Supreme Court of Iowa that contract was limited to taxes laid directly upon property in proportion to its value, and did not include taxes in nature of an excise upon net income of an owner, was not unreasonable (Code Iowa 1935, §§ 4753-a13, 4753-a14, 6943-f4 et seq. 6944 (5), 6944 (22), 6953, 7171; Const. U. S. art. 1, section 10).

"6. Even if Iowa statute exempting bonds of Iowa and its political subdivisions from taxation created a contract, interest on such bonds could be included in assessment of tax on net income of owners of bonds without an unconstitutional impairment of obligation of contract (Code Iowa 1935), sections 4753-a13, 4753-a14, 6943-f4 et seq. 6944(5), 6944(22), 6953, 7171; Const. U. S. art. 1, section 10)."

We quote from the opinion:

"... Many, perhaps most, courts hold that a net income tax is to be classified as an excise. 'The tax levied on income is not a property tax, but it is a percentage laid on the amount which a man receives, irrespective of whether he spends it, wastes it, or invests it.' Featherstone *v.* Norman, 170 Ga. 370, 382, 153 S. E. 58, 65, 70 A. L. R. 449; Purnell *v.* Page, 133 N. C. 125, 129, 45 S. E. 534. ..."

We quote again from the opinion:

"The taxpayer in People ex rel. Clyde *v.* Gilchrist (262 U. S. 94) claimed the benefit of an exemption under a statute of New York to the effect that, upon payment of a recording tax, debts and obligations secured by mortgages of real property should be exempt from other taxation by the State and local subdivisions. The question was whether the exemption thus accorded was applicable to an income tax enacted long afterwards. The State court ruled against the taxpayer (People ex rel. Central Union Trust Co. *v.* Wendell, 197 App. Div. 131, 188 N. Y. S. 344; People ex rel. Clyde *v.* Wendell, 197 App. Div. 913, 187 N. Y. S. 949; Id., 232 N. Y. 550, 134 N. E. 567), assuming the existence of a contract of exemption, but holding that it was not intended to apply to taxes upon income. This court considering the fact that at the date of the exemption statute 'no one thought of an income tax,' and recalling that 'any contract of exemption must be shown to have been indisputably within the intention of the legislature,' sustained the judgment of the State court, 'The conclusion does not seem to us very difficult to reach.'" (Emphasis supplied.)

"The controversy in New York ex rel. Cohn *v.* Graves, (300 U. S. 308, 47 Sup. Ct. 466), decided at the last term, evoked a ruling by this court that a State tax upon net income which included rents derived from land in another State was not equivalent to a property tax imposed upon

the land itself. 'The incidence of a tax on income differs from that of a tax on property. Neither tax is dependent upon the possession by the taxpayer of the subject of the other. His income may be taxed, although he owns no property, and his property may be taxed, although it produces no income.'" . . . This line of thought was also followed in the case of *United States Trust Co.* v. *Helvering, Com'r.*, 307 U. S. 57, 59 Sup. Ct. 692, where an exemption from the estate tax was denied the administrator of a World War veteran.

In the case of *J. D. Adams Manufacturing Company* v. *Storen*, 304 U. S. 307, 58 Sup. Ct. 915, the same question came up relative to income tax on property exempt from property tax. The court ruled that the case of *Hale* v. *Iowa State Board*, 302 U. S. 95, controlled in this case.

In the case of *Silas Mason Company* v. *Tax Commissioner of the State of Washington*, 302 U. S. 186, 59 Sup. Ct. 233, the court held that a gross income tax levied by the State of Washington would apply to construction contracts with the United States.

Again the case of *Atkinson* v. *Tax Commissioner of Oregon*, 303 U. S. 20, 58 Sup. Ct. 419, the court held that the Oregon personal income tax would apply to the net income derived from the construction of the dam within such State with a contract with the United States.

Still again in *Helvering* v. *Bankline Oil Company*, 303 U. S. 62, 58 Sup. Ct. 616, the court held that the holder of a lease from a State of oil and gas tide-lands is subject to Federal income tax upon the profits of its operations and is not exempt on the ground that such tax is an unconstitutional burden upon a State instrumentality.

Again in the case of *Helvering* v. *Mountain Producers Corp.*, 302 U. S. 376, 58 Sup. Ct. 623, the income was received by a lessee under a lease from the State and the

court held it was not exempt from income tax on the theory that the recipient of the income is a State instrumentality.

Again in the case of *New York Rapid Transit Corporation* v. *State of New York*, 303 U. S. 573, 58 Sup. Ct. 721, there was an attempt to plead a contract not to lay any new taxes upon the corporation. The court held against the alleged exemption, holding that, "Where one relies upon exemption from taxation both the power to exempt and the contract of exemption must be clear. Any doubt or ambiguity must be resolved in favor of the people." The court also used the following language applicable to the case at bar: "Where the intention was to prevent the imposition of any new taxes, adequate language was available."

It will be noted that in all the foregoing cases the United States Supreme Court completely reversed the trend of former decisions relative to tax exemptions and overruled either specifically or by implication all those decisions contrary to this new line of thought. Since that time the United States Supreme Court has held to this theory that all should bear their part of the burdens incident to the maintenance of our government. The case of *Graves* v. *New York*, 306 U. S. 466, 59 Sup. Ct. 595, followed this same trend. In that case an exemption from income tax by the State of New York on the salary of an employee of the Home Owners Loan Corporation was claimed. The court used the following forceful language: "(8) "The present tax is a non-discriminatory tax on income applied to salaries at a specified rate. It is not in form or substance a tax upon the Home Owners' Loan Corporation or its property or income, nor is it paid by the corporation or the government from their funds. It is measured by income which becomes the property of the taxpayer when re-

ceived as compensation for his services; and the tax laid upon the privilege of receiving it is paid from the private funds and not from the funds of the government, either directly or indirectly. The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source is no longer tenable. . . ." (Emphasis supplied.)

Wherefore, appellee respectfully submits this statement showing that the questions upon which the decision of this cause depends are so unsubstantial as not to need further argument or further consideration of this court and appellee respectfully moves the court to dismiss this appeal, or in the alternative to affirm the judgment of the Supreme Court of Georgia.

This 24th day of July, 1946.

EUGENE COOK,
Eugene Cook, Attorney General;
CLAUDE SHAW,
Claude Shaw, Ass't. Attorney General;
C. E. GREGORY,
C. E. Gregory, Jr., Asst. Attorney General;
VICTOR DAVIDSON,
Victor Davidson, Asst. Attorney General,
Attorneys for M. E. Thompson, State Revenue Commissioner.

JAN 13 1947

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 385

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant.

vs.

M. E. THOMPSON, State Revenue Commissioner of Georgia,
Appellee.

BRIEF OF APPELLEE

EUGENE COOK,
Attorney General

VICTOR DAVIDSON,
Ass't. Atty. General

C. E. GREGORY, JR.,
Ass't. Atty. General

CLAUD SHAW,
Ass't. Atty. General

SUBJECT INDEX.

		Page
I.	Statement of the Case	1
II.	Summary of Argument of Appellee	4
III.	Argument and Authorities	5
	1. There is no Federal Question Involved	5
	(a) The Supreme Court of Georgia has held that there is no contract between the State of Georgia and the appellant whereby income taxes are exempted.	
	2. Even if the Georgia Railroad Company Was Granted An Income Tax Exemption by the Act of 1833 It Could Not Transmit This Exemption to Appellant and Appellant's Evidence Shows it Had No Intent to Transmit It	7
	3. The Supreme Court Should Accept the Judgment of the Supreme Court of Georgia Because it is Manifestly Right	11
	4. The Case of Hale vs. Iowa State Board of Assessment And Review, 302 U. S. 95 Controls The Case at Bar	12
	5. The Appellant is Bound by its Pleadings and Judgment Granted Thereunder in the Case of Wright vs. L. & N. and the Atlantic Coast Line Railroad Company, 236 U. S. 687	18
	The Inconsistency of the Evidence Introduced by Appellant and the Argument of its Counsel	20
	6. The Cases Urged as Res Adjudicata or Controlling by Appellant Were Each and Every One a Case in Which the Issue was a Property Tax Which Includes Franchise Taxes, and in None Were Income Taxes Involved and Because of That Each Has no Control Over the Case at Bar	21
	In Conclusion	25

TABLE OF CASES CITED

Page

J. D. Adams Manufacturing Company vs. Storen, 304 U. S. 307; 58 Sup. Ct. 915 15

Atkinson vs. Tax Commissioner of Oregon, 302 U. S.; 58 Sup. Ct. 419 16

Bank of Georgia vs. The Mayor and Aldermen of Savannah (1832) Dudley 2, 130, 137 11

Board of Directors of Chicago Theological Seminary vs. People of the State of Illinois, 188 U. S. 662; 23 Sup. Ct. Rep. 386, 388 7

Central of Georgia Railway Company vs. Wright, 250 U. S. 519 25

Dodge vs. Board of Education, 302 U. S. 12

Featherstone vs. Norman, 170 Ga. 370, 373 12

Georgia vs. Georgia Railroad and Banking Company, 54 Ga. 423 24

Graves vs. New York, 306 U. S. 466; 59 Sup. Ct. 595 . . 17

Hale vs. Iowa State Board of Assessment and Review, 302 U. S. 95 . . . . . 5, 6, 12

Helvering vs. Mountain Producers Corp., 302 U. S. 376; 58 Sup. Ct. 623 16

Helvering vs. Bankline Oil Company, 303 U. S. 62; 58 Sup. Ct. 616 16

Lynch vs. U. S., 292 U. S. 571; 54 Sup Ct. 840 20

The Mayor of Savannah vs. Hartridge, 8 Ga. 23 11

New York Rapid Transit Corporation vs. State of New York, 303 U. S. 573; 58 Sup. Ct. 721 16

Pickard, State Comptroller vs. East Tenn. V. & G. R. Co., 130 U. S. 637; 9 Sup. Ct. 640 10

Rochester Railway Company vs. City of Rochester, 205 U. S. 236; 27 Sup. Ct. 469, 472 10

Silas Mason Company vs. Tax Commissioner of the State of Washington, 302 U. S. 186; 69 Sup. Ct. 233 16

Wright, Comptroller General vs. Georgia Railroad and Banking Company, 216 U. S. 420; 30 Sup. Ct. 242 . 2, 23

Wright, Comptroller General of Georgia vs. L & N Railroad and the Atlantic Coast Line Company, 236 U. S. 687; 35 Sup. Ct. 475 . . . . . 3, 5, 18, 24

Wright vs. Central of Georgia Railroad Company, 236 U. S. 674 24

IN THE

SUPREME COURT OF THE UNITED STATES

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant.

vs.

M. E. THOMPSON, State Revenue Commissioner of Georgia,
Appellee.

BRIEF OF APPELLEE

PART I

Statement of the Case

The Supreme Court of Georgia in a unanimous decision held that a property tax limitation granted in 1833 to the Georgia Railroad Company did not constitute an income tax exemption to the Atlantic Coast Line Railroad Company, a remote lessee of the property of its landlord, Georgia Railroad and Banking Company, on income earned by the operation of the rented property.

The income sought to be taxed by the State of Georgia was earned by the Appellant, the Atlantic Coast Line Railroad Company, through the employment of its capital, the employment of labor, expert management, a correlating of its other railroads with what is known as the Georgia Railroad, and lastly by the use of the property of the Georgia Railroad and Banking Company, which as tenant it operates.

Section XV of the Act of 1833 creating the Georgia Railroad Company relied on by Appellant as an income tax exemption contained the following:

> "The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of said railroads and any of them; and after that shall be subject to a tax not exceeding one-half per cent per annum on the net proceeds of their investments."

From the year 1804 on up through all the years in which tax exemptions for railroads were being granted, the method of taxation in Georgia was a property tax. Corporations in any instances were taxed on the capital stock, a property tax, usually 31¼ cents per hundred. Income taxation was not known in the Georgia scheme of taxation. Therefore, when the Act of 1833 was passed, the only form of taxation of corporations in use being a property tax, it was clearly the intention of the General Assembly to limit the amount that could be levied on the "stock" (a property tax), based on the amount of the net income earned by the corporation.

In 1881 the Georgia Railroad and Banking Company leased its property to William M. Wadley, but did not specifically convey any tax exemptions to Wadley. Wadley conveyed this lease to others, and on down through a long series of subtenants the lease to one-half undivided interest in this railroad was conveyed to the Atlantic Coast Line Railroad. In none of these conveyances was any tax exemption conveyed. (T.R. 48)

In 1910, almost 30 years after the above lease was executed by the Georgia Railroad and Banking Company to William M. Wadley and possession of said road parted with, the case of Wright, Comptroller General vs. Georgia Railroad and Banking Company came on for a hearing before the United States Supreme Court, as reported in

216 U.S. 420, 30 Sup. Ct., Page 242.

In this case the Georgia Railroad and Banking Company filed its petition for injunction in the Federal Court of the

Northern District of Georgia, alleging that Wright, Comptroller General of Georgia, had issued executions for a certain franchise tax (a property tax) and was exceeding his authority as Comptroller General and prayed for injunction. This case also prayed for a declaratory judgment declaring that this corporation was subject to no other taxation except that one-half of one per cent on its net income. The State of Georgia levied no income tax at that time, was not attemping to levy any income tax. The State of Georgia was not a party in the above case because it was against Wright as an individual and the State could not be bound by the judgment therein. The Atlantic Coast Line Railroad Company was not at the time of this decision in privity with the Georgia Railroad and Banking Company because of the fact that it had been almost 30 years since the latter had granted the lease of its property to Wadley.

In 1915 the case of

> Wright, Comptroller General of Georgia vs. L. & N. Railroad and the Atlantic Coast Line Company, 236 U.S. 687 (35 S. Ct. 475)

was decided in the United States Supreme Court. This case was brought in the Federal Court by the Railroad Companies against Wright, Comptroller General, in his individual capacity similar to that brought by the Georgia Railroad and Banking Company, supra, alleging that Wright was exceeding his authority as Comptroller General and was threatening to levy tax executions for property taxes against the Railroad Companies as lessees of the Georgia Railroad.

In their petition the petitioners alleged that they were merely tenants of the property sought to be taxed and that the only right they had was the right to use this Railroad. Judge Newman, of the Northern District of Georgia, sustained this contention that these two companies were merely

tenants and had no property rights in the Railroad, only the usufruct.

In 1931 Georgia enacted the Income Tax law, a personal tax, which has been repeatedly held not to be a property tax. This Income Tax law provides for the payment by corporations of 5½ per cent of the net income from the property owned or from business done in Georgia.

The State of Georgia, through its Revenue Commissioner, having assessed the income earned by the Atlantic Coast Line Railroad Company on this particular Railroad, the Atlantic Coast Line Railroad pleaded that this income was exempt by reason of Section XV of the Act of 1833 and that this tax limitation inured to the appellant and that the assessment of the income taxes constituted an impairment of the contract entered into between the State of Georgia and the Georgia Railroad Company. The Supreme Court of Georgia in Headnote 2, held as follows:

> "2. Where as here such charter provision limits the tax on the "stock" of the corporation to ½ of 1 per cent, 'on the net proceeds of their investments', it is a property tax and constitutes no bar to the collection by the State under the 1931 income tax law as amended (Ga. L. 1931, Ex. Sess. p. 24) of an income tax from a lessee of the corporation on its net income derived from the use of the corporate property on which the charter thus limits the property tax."

PART II

SUMMARY OF ARGUMENT OF APPELLEE

1. The Supreme Court of the United States should not assume jurisdiction of this case:

   (a) Because there is no Federal question involved.

   (a-1) The evidence shows no contract for income tax exemptions between the appellant and the State of Georgia.

(a-2) Even if the Georgia Railroad and Banking Company had an income tax exemption, this would be a personal exemption and it could not transmit this exemption to appellant, and the evidence shows intent not to do so.

2. The issue involved in this case as to whether income from property exempt from property tax is exempt from income taxes has already been determined by the Supreme Court of the United States and by reason of same is too unsubstantial for this court to consider further.

3. The Supreme Court will accept the judgment of the Supreme Court of Georgia unless it is manifestly wrong.

4. The case of

Hale vs. Iowa State Board of Assessment and Review, 302 U. S. 95

controls the case at bar.

5. The appellant is bound by its pleading and judgment granted thereunder in the case of

Wright vs. L & N and the Atlantic Coast Line Railroad Company 236 U. S. 687.

6. The cases urged as res adjudicata or controlling by appellant were each and every one a case in which the issue was a property tax which includes franchise taxes, and in none were income taxes involved and because of that each has no control over the case at bar.

PART III
ARGUMENT AND AUTHORITIES

1. There is no Federal question involved.

The Supreme Court of Georgia has held that there is no contract between the State of Georgia and the appellant whereby income taxes are exempted.

In view of the fact that the Supreme Court after considering the appellant's statement of jurisdiction has merely noted "probable jurisdiction", we respectfully urge that no jurisdiction should be assumed and insist that no Federal question is involved in this case. Appellant bases its claim to the jurisdiction of this court entirely upon an impairment of a contract alleged to exist between the State of Georgia and the Atlantic Coast Line Railroad Company whereby the State has granted income tax exemption.

Nowhere in the evidence can it be shown that appellant, a remote tenant of its landlord, the Georgia Railroad and Banking Company, has any contract with the State of Georgia whereby income tax exemption has been granted to the appellant. Therefore the first thing to be considered by this court is whether the decision of the Supreme Court of Georgia was manifestly wrong in holding there is no contract for income tax exemption existing between the appellant and the State of Georgia. If there is no contract then there is no Federal question.

> "2. The Supreme Court leans toward agreement with state courts and accepts their judgment as to whether state statute impairs obligation of contract unless manifestly wrong."
>
> Hale vs. Iowa State Board of Assessment and Review
> 302 U.S. 95; 58 Sup. Ct. 102; 82 L. ed. 72.

Before the Appellant can present a Federal question as to the impairment of a contract, it must first show that it has a contract relative to taxes with the State of Georgia through which contract is entitled to tax exemption. There is no evidence to show that Appellant has a contract of any kind with the State of Georgia. Especially is there no evidence to show that Appellant has any tax exemption contract from the State of Georgia or that in so far as tax

exemption is concerned is it in privity with anyone that does have tax exemption. As a mere tenant of the property owned by the Georgia Railroad and Banking Company it has no property rights therein, and not having any property rights to be taxed it is not in privity with the Georgia Railroad and Banking Company as to any contractual rights the latter corporation might have with the State of Georgia relative to stock tax limitations.

The Supreme Court of Georgia in this case has construed that Section XV of the Act of 1833, pleaded and relied on by Appellant, constitutes no contract between the State of Georgia and Appellant, or anyone else with which Appellant is in privity, whereby Appellant is entitled to income tax exemption earned in the operation as tenant of the railroad rented from the Georgia Railroad and Banking Company. The Supreme Court of Georgia has thus construed Section XV, and its judgment should be considered by the United States Supreme Court.

Board of Directors of Chicago Theological Seminary vs. People of the State of Illinois, 188 U. S. 662, 23 Sup. Ct. Reporter 386, 388.

> "We acknowledge and affirm the principle that this court in this class of cases must decide upon its own responsibility as to the existence and meaning of the contract, but in arriving at such meaning in a case like this, the decision of the state court is entitled to exercise marked influence upon the question this court is called upon to decide, and where it cannot be said that the decision is in itself unreasonable or in violation of the plain language of the statute, we ought, in cases engendering a fair doubt, to follow the state court in its interpretation of the statutes of its own state."

2. ***Even if the Georgia Railroad Company was granted an income tax exemption by the Act of 1833 it could not transmit this exemption to appellant and appellant's evidence shows it had no intent to transmit it.***

Even if the Georgia Railroad and Banking Company had the tax exemption as to income taxes, and even though it had the power to transmit it, the lease contract dealing with this fails to so convey. And even though this exemption from income taxes was conveyed to the lessee there is no authority of law for the lessee and his assigns to transmit it on to Appellant.

The contract of Georgia Railroad and Banking Company to William M. Wadley provides as to taxes:

> "And the party of the first part also agrees to pay the taxes, which may be payable under the Charter of the party of the first part, on the rental hereinafter stipulated, or on so much thereof as may be taxable, and all taxes, if any, which may become by law collectible from the party of the first part on the shares of its stock in the hands of its shareholders. But all other taxes, which, may be payable on the property and franchises, which for the control, use or enjoyment of which, is hereby rented, farmed out, assigned or transferred to the party of the second part and his assigns shall be paid by the party of the second part and his assigns." (T.R. 51)

No income tax exemption was intended to be conveyed, or even dreamed of at the time of this lease, 1881.

The burden is on Appellant to show that the Charter authorized the Georgia Railroad and Banking Company to convey the tax immunity to others, and that there was an actual conveyance of tax immunity by said company and by the numerous assignees down to it.

The lease and all the assignment refute the claim that any immunity from income taxes was conveyed to Atlantic Coast Line Railroad Company.

Likewise the evidence introduced by it shows that the Georgia Railroad and Banking Company is itself claiming

income tax exemption on the income from the lease as shown by its tax return..(T.R. 60-65, 126, Par. 10)

It is inconceivable that the Georgia Railroad and Banking Company should be able to hold on to an income tax exemption and at the same time convey it to another.

If the conveyance of tax immunity by the Legislature must be construed strictly, it would likewise appear that a conveyance of a tax immunity from the holder of this immunity to another person would perforce of necessity be required to be construed in the same manner. The lease shows that no tax immunity from income taxes was conveyed by Georgia Railroad and Banking Company to its lessee, nor by the lessee to his assignee, nor by any of the numerous assignees on down to appellant. If such be the case, under whom does the appellant claim tax exemption? It can not claim exemption by virtute of a grant from the General Assembly. The lease shows it was not conveyed to it by the Georgia Railroad and Banking Company, and the evidence of appellant shows that it was not the intention of the Georgia Railroad and Banking Company to convey any income tax immunity to appellant but to retain this income tax immunity to itself.

We have seen that income tax is a tax personal to the corporation. If there is an exemption to the income tax, it would likewise be personal to the corporation. If personal to the corporation, then, it can not be conveyed to another person by this corporation.

The evidence shows that the one-half interest in the lease owned by Central Railroad and Banking Company was sold under order of Court and there is no conveyance of any tax immunity contained in the conveyance executed pursuant to this sale. (T. R. 44-45) Neither is there any conveyance of any tax exemption from Central Railroad

and Banking Company to the Central of Georgia Railroad Company. On this subject the United States Supreme Court in the case of

Pickard, State Comptroller
vs. East Tenn. V. & G. R. Co.
130 U. S. 637, 9 Sup. Ct. 640,

holds as follows:

> "Immunity from taxation does not pass merely by a conveyance of the 'property and franchises' of a railroad company under a judicial sale, in a suit brought by the State to enforce a statutory lien, though such company's property was held by it exempt from taxation."

We also quote from the case of

Rochester Railway Company
vs. City of Rochester
205 U. S. 236, 27 Sup. Ct. 469, 472;

> " . . . Although the obligations of such a contract of exemption are protected by the Federal Constitution from impairment by the state, the contract itself is not property, which, as such, can be transferred by the owner to another, because, being personal to him with whom it was made, it is incapable of assignment. The person with whom the contract is made by the state may continue to enjoy its benefits unmolested as long as he chooses, but there his rights end, and he cannot, by any form of conveyance, transmit the contract or its benefits to a successor. . . ."

We therefore respectfully submit there is no Federal question involved and that all the issues involved in the case at bar have already been determined by the Supreme Court of the United States and by reason of this the issues presented herein are too unsubstantial for this court to conside further.

3. The Supreme Court should accept the judgment of the Supreme Court of Georgia because it is manifestly right.

For the Supreme Court of Georgia to hold that a stock tax limitation granted to a landlord does not include an income tax exemption to a remote tenant of the property of this landlord is manifestly a correct ruling of law. It emphasizes that prevailing line of thought that all persons should be required to bear their just share of the expenses of the Government under which they exist and do business.

The decision of Georgia Supreme Court was in keeping with a long line of Georgia decisions dating back to 1832, more than a year before the charter was granted to the Georgia Railroad Company, under which appellant claims income tax exemption, as follows:

> Bank of Georgia vs. The Mayor and Alderman of Savannah (1832) Dudley 2, 130, 137.
>
> "Every man's private business, pursuit or calling, are things in which he has an interest, and many species of employment are legitimate subjects of taxation, and are taxed—still they are not, strictly speaking, property; they are the means from which income is derived, property made—but there is a clear distinction between the employment and the income or profits. Franchises are incorporeal hereditaments. From the exercise of the business authorized, and the privileges conferred, income is derived; but the money produced is not to be confounded with the operations from which it is derived."
>
> The Mayor of Savannah, v. Hartridge 8 Ga. 23
>
> "(1). Taxation, in reference to the subject matter, is divided by writers on political economy, as well as the taxlaws of all governments, into three classes—

capitation, property and income; and where one or more is treated of or acted upon, the other is never intended".

"(3). A charter, authorizing a municipal corporation to tax real and personal estate, does not, necessarily confer the right to tax income."

Featherstone vs. Norman,
170 Georgia 370, 373.

"So both the property from which the income comes, and the income itself, are subject to separation assessment for taxation. The two are separate and distinct things. The taxation of one is not the taxation of the other. The assertion that the tax on one is a tax on the other is a fanciful conceit to which we cannot agree."

We therefore urge that the rule of decisions of the Supreme Court of the United States should be followed here as is set in Headnote 6 of the case of

Dodge vs. Board of Education
302 U. S.,

"6. Though United States Supreme Court must reach independent judgment concerning existence and nature of contract allegedly created by statute, it gives great weight to views of highest court of state wherein statute was enacted."

4. The case of

Hale vs. Iowa State Board of Assessment and Review,
302 U.S. 95,

controls the case at bar.

The case at bar is even stronger than the Hale case in that the taxpayer in that case was the owner of the bonds, the income from which was sought to be taxed, while in the present case the appellant does not own the railroad from which the income was earned but merely rents this

railroad and has no property right therein.

The question in the Hale case was whether the interest upon bonds of the State of Iowa, or its political subdivisions, could be included in an assessment of a tax on the net income of the owners without detracting from *earlier exemptions in respect to taxes upon property and without an unconstitutional impairment of the obligation of a contract.*

In that case, the taxpayer, a resident of Iowa, owned Bonds issued by Iowa School Districts, Iowa Road Bonds, Iowa County Bonds and Iowa Soldiers' Bonus Bonds. At the time these bonds were issued the statute provided that such bonds "*are not to be taxed*" or "shall be exempt from taxation." At the time Iowa had no income tax, just as Georgia levied no income tax in 1833. Later Iowa imposed an income tax, just as Georgia did, and an attempt was made to tax the income derived from the interest of these bonds. The taxpayer pleaded the impairment of the obligation of the contract of exemption. The Supreme Court of Iowa upheld the assessment and *interpreted the contracts as limited to taxes laid directly upon property in proportion to its value and not as touching taxes in the nature of an exercise on the net income of the owner.*

This case was carried to the United States Supreme Court by appeal. For the convenience of the Court, we quote the material headnotes of this case and also portions of the opinion:

"4. Grants of immunity from taxation, in derogation of sovereign power of the State, are strictly construed.

"5. Even if Iowa statute exemption bonds of State of Iowa and its political subdivisions from taxation created a contract, determination of Supreme Court of Iowa that contract was limited to taxes laid directly upon property in

proportion to its value, and did not include taxes in nature of an excise upon net income of an owner, was not unreasonable (Code Iowa 1935, Sections 4753-a13, 4753-a14, 6943-f4 et. seq. 6944(5), 6944(22), 6953, 7171; Const. U. S. Art. 1, Section 10).

"6. Even if Iowa statute exempting bonds of Iowa and its political subdivisions from taxation created a contract, interest on such bonds could be included in assessment of tax on net income of owners of bonds without an unconstitutional impairment of obligation of contract (Coda Iowa 1935), sections 4753-a13, 4753-a14, 6943-f4 et seq. 6944 (5), 6944 (22), 6953, 7171; Const. & S. Art. 1, Section 10)."

We quote from the opinion:

> " . . . Many, perhaps most, courts hold that a net income tax is to be classified as an excise. 'The tax levied on income is not a property tax, but it is a percentage laid on the amount which a man receives, irrespective of whether he spends it, wastes it, or invests it.' Featherstone vs. Norman, 170 Ga. 370, 382, 153 S. E. 58, 65, 70 A.L.R. 449; Purnell vs. Page, 133 N. C. 125, 129, 45 S. E. 534." . . .

We again quote from the opinion:

> "The taxpayer in People ex. rel. Clyde vs. Gilchrist (262 U. S. 94) claimed the benefit of an exemption under a statute of New York to the effect that, upon payment of a recording tax, debts and obligations secured by mortgages of real property should be exempt from other taxation by the State and local subdivisions. The question was whether the exemption thus accorded was applicable to income tax enacted long afterwards. The State court ruled against the taxpayer (People ex rel. Central Union Trust Co. vs. Wendell, 197 App. Div. 131, 188 N. Y. S. 344; People ex rel. Clyde vs. Wendell, 197 App. Div. 913,

187 N. Y. S. 949; Id., 232 N. Y. 550, 134 N. E. 567), assuming the existence of a contract of exemption, but holding that it was not intended to apply to taxes upon income. *This court considering the fact that at the date of the exemption statute 'no one thought of an income tax,' and recalling that 'any contract of exemption must be shown to have been indisputably within the intention of the Legislature,'* sustained the judgment of the state court 'The conclusion does not seem to us very difficult to reach." . . . (Emphasis supplied)

"The controversy in New York ex rel. Cohn vs. Graves, (300 U. S. 308, 47 S. Ct. 466), decided at the last term, evoked a ruling by this court that a State tax upon net income which included rents derived from land in another state was not equivalent to a property tax imposed upon the land itself. 'The incidence of a tax on income differs from that of a tax on property. Neither tax is dependent upon the possession by the taxpayer of the subject of the other. His income may be taxed, although he owns no property, and his property may be taxed, although it produces no income." . . .

This line of thought was also followed in the case of:

United States Trust Co. vs. Helvering, Com'r
307 U. S. 57, 59 S. C. 692

Here an exemption from the estate tax was denied the administrator of a World War Veteran.

In the case of

J. D. Adams Manufacturing Company
vs. Storen, 304 U. S. 307, 58 Sup. Ct. 915,

the same question came up relative to income tax on property exempt from property tax. The court ruled that the case of Hale vs. Iowa State Board, 302 U. S. 95, controlled in this case.

In the case of

Silas Mason Company vs. Tax Commissioner

of the State of Washington,
302 U. S. 186, 69 Sup. Ct. 233,

the court held that a gross income tax levied by the State of Washington would apply to construction contracts with the United States.

Again in the case of

Atkinson vs. Tax Commissioner of Oregon,
302 U. S., 58 Sup. Ct. 419,

the court held that the Oregon personal income tax would apply to the net income derived from the construction of a dam within such state with a contract with the United States.

Still again in

Helvering vs. Bankline Oil Company,
303 U. S. 62, 58 Sup. Ct. 616,

the court held that the holder of a lease from a state of oil and gas tide lands is subject to Federal income tax upon the profits of its operations and is not exempt on the ground that such tax is an unconstitutional burden upon a state instrumentality.

Again in the case of

Helvering vs. Mountain Producers Corp.,
302 U. S. 376, 58 Sup. Ct. 623,

the income was received by a lessee under a lease from the state and the court held it was not exempt from income tax on the theory that the recipient of the income tax is a state instrumentality.

Again in the case of

New York Rapid Transit Corporation vs.
State of New York,
303 U. S. 573, 58 Sup. Ct. 721,

there was an attempt to plead a contract not to lay any new taxes upon the corporation. The court held against the alleged exemption, holding that

> "where one relies upon exemption from taxation, both the power to exempt and the contract of exemption must be clear. Any doubt or ambiguity must be resolved in favor of the people."

The court also used the following language applicable to the case at bar:

> "Where the intention was to prevent the imposition of any new taxes, adequate language was available."

It will be noted that in all the foregoing cases the United States Supreme Court completely reversed the trend of former decisions relative to tax exemptions and overruled either specifically or by implication all those decisions contrary to this new line of thought. Since that time the United States Supreme Court has held to this theory that all should bear heir part of the burdens incident to the maintenance of our government. The case of

Graves vs. New York,
306 U. S. 466, 59 Sup. Ct. 595,

followed this same trend. In that case an exemption from income tax by the State of New York on the salary of an employee of the Home Owners Loan Corporation was claimed. The court used the following forceful language:

> "(8) The present tax is a non-discriminatory tax on income applied to salaries at a specified rate. It is not in form or substance a tax upon the Home Owners' Loan Corporation or its property or income, nor is it paid by the corporation or the government from their funds. It is measured by income which becomes the property of the taxpayer when received as compensation for his services; and the tax laid

upon the privilege of receiving it is paid from the private funds and not from the funds of the government, either directly or indirectly. *The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source is no longer tenable.* . . ." (Emphasis supplied)

5. The appellant is bound by its pleadings and judgment granted thereunder in the case of

Wright vs. L & N and the Atlantic Coast Line Railroad Company
236 U. S. 687

In the petition in that case appellant set up the fact that it was a mere tenant of this particular railroad and had no property rights whatsoever therein and that the ½ of one percent on the income was a property tax. From this sworn petition we quote:

"14. Your orators have no such right, title, interest or estate in the property assessed against your orators as aforesaid, as makes your orators liable for taxes thereon. All of said property is now and ever has been since its creation the sole property of your orator's lessor, the Georgia Railroad and Banking Company, which company alone is liable for such tax as may be lawfully imposed on said property. Your orators are merely the tenants of said property for a term of years, which may be the happening of contingencies expressly stated in the instrument of lease, come to an end at any time prior to the expiration of the term limited in the lease.

"15. Said lessor, The Georgia Railroad and Banking Company has never parted with its right, title and estate in said property or sought to do so. . . ."

"17. Your orators do not claim that the property covered by the charter of The Georgia Railroad and Banking Company, which has been assessed by the defendant as per Exhibit B, is exempt from taxation.

> On the contrary, your orators aver that it is taxable, but in accordance with a special scheme of taxation enacted by the wisdom of the legislature, dealing at that date with the economic conditions and governmental problems of the day. It was never the purpose of the legislature to relieve that company from all taxation, but to encourage an untried enterprise of great benefit, if successful, to the state. In pursuance of that purpose, the legislature devised a system of taxation for the enterprise which it desired to foster. The principle, therefore, that immunity from taxation granted to a corporation will not pass by a sale to another person of the corporation's property and franchises has no application in this case." . . . (T. R. 116, 117)

It appears this same appellant in the foregoing case went to considerable lengths in order to establish the fact that it was a mere tenant and that the Georgia Railroad and Banking Company was the landlord.

Not only did the present appellant swear to the foregoing, but on these pleadings obtained the following judgment from Judge Newman of the District Court, which was affirmed by the highest court of the land to the effect that it was not liable for the property tax because of the fact that it was a mere tenant and under the lease had nothing to exempt.

> "1. That the lease executed by the Georgia Railroad and Banking Company to William M. Wadley exhibited to the bill of complaint in this case, of which the complainant or assignee under said Wadley, created a relationship of landlord and tenant between the parties thereto and did not vest in said lessee any estate, but only usufruct, which is not subject to be taxed, and that the property covered thereby had its renewals, alterations and betterments made by the lessees is not subject to ad valorem taxation". (T. R. 121)

Appellant invoked the above decision and ought to be

bound by it. Its petition pleaded this and the court sustained its pleadings. This decision holding there was no property right conveyed by the lease. Any exemption from taxation would be a property right.

Lynch vs. U.S.
292 U. S. 571, 54 Sup. Ct. 840.

Appellant's contentions in the case at bar are diametrically opposed to its contentions in that decided in the 236th U. S. set out above. *In that case it was attempting to escape a property tax; it established the fact that Section XV of the Act of* 1833 *was a property tax and that the Georgia Railroad and Banking Company had paid this tax. In the case at bar it is attempting to escape an income tax; Section XV, therefore, metamorphoses into an income tax.*

In the present case it bases its claim of exemption on the theory that immunity from taxation passed from the Georgia Railroad and Banking Company to the Atlantic Coast Line Railroad Company. In its case in the 236th U. S. its pleadings show no tax immunity passed:

> "17. . . . The principle, therefore, that immunity from taxation granted to a corporation will not pass by a sale to another person of the corporation's property and franchises has no application in this case. . . ."

THE INCONSISTENCY OF THE EVIDENCE INTRODUCED BY APPELLANT AND THE ARGUMENT OF ITS COUNSEL

We call attention to the following statements in appellant's brief, page 31, VII:

> "The charter tax is not a property tax. It is an income tax."

Page 35, VIII:

> . . . . . There is no rule for the interpretation of the

Supreme Court of Georgia that the charter tax was a property tax."

The inconsistency between the evidence offered by appellant which sets out in no uncertain terms that the tax provided in the charter is a property tax and the above argument which is directly opposite to such evidence is so striking that we ask the court to consider it. We are unable to reconcile the difference in the argument and the evidence introduced by appellant in the above Atlantic Coast Line case in which appellant was a party and pleaded this was a property tax and obtained a judgment to this effect. We especially call attention to the following extract from paragraph 17 of its petition therein:

". . . . your orators aver that it(railroad property) is taxable but in accordance with its special scheme of taxation enacted by the wisdom of the legislature."

6. The cases urged as res adjudicata or controlling by appellant were each and every one a case in which the issue was a property tax which includes franchise taxes, and in none were income taxes involved and because of that each has no control over the case at bar.

Appellant's brief on page 12 and 13 cites numerous cases which is claimed to control the case at bar. However, a careful examination of each one shows unmistakably that they have no bearing on the question as to whether income earned by appellant in the operation of this road is exempt, because that issue was never presented to the courts in either of these cases.

Each of these cases involved the question as to whether the property of the Georgia Railroad and Banking Company and property of railroads having similar tax exemption provisions, including franchises, was taxable, franchises being

property and an element of "stock" and a franchise tax being a property tax and the decision of the court was in each instance that the property was either not subject to an ad valorem tax, or was not subject to a franchise tax, as was in each of these cases attempted to be levied by the State of Georgia. The courts in these cases was construing the meaning of the word "*stock*", and determining whether either the owners or the lessees of these railroads were subject to either ad valorem or a franchise tax on that item of property which was included in the term "stock".

At the time they were decided the State of Georgia had not even enacted the income tax act of 1931, and the court could not possibly have had in mind any question of income tax, as provided by the present income tax laws of Georgia. Also that in the case of 216 U. S. 420, the Georgia Railroad and Banking Company pleaded as res adjudicata the first named case above, but the Supreme Court of the United States refused to treat it as res adjudicata.

It will be noted that at the time the decision was rendered in the 216 U. S., the Supreme Court of the United States was following a line of decisions to the effect that the income from tax exempt property was likewise exempt. Its ruling in that case was based on this theory. We quote from the opinion:

" . . . A tax upon earnings is a tax which at last covers and includes, unless double taxation is intended, all property necessarily held and used to make that income, including the enjoyment of its franchises. . . ."

As has been seen in the Hale case, and others, the above ruling has been overruled and is no longer followed.

In all the cases set out above it will be seen that whenever any of the above railroad companies were attempting to escape a property tax, the tax limitation in their respec-

tive charters immediately became a property tax, and the lessees of the property having nothing to tax, so it was not necessary for immunity from taxation to pass from the lessor to the lessee. As an illustration of this, in view of the fact that the Supreme Court of the United States will take cognizance of its own records, we call attention to the transcript of the record in the case of Central of Georgia Railway Company vs. Wright in the 248 U. S. and 250 U. S. above. We quote from paragraph 27 of the petition of said company, as set out on page 21 of the printed transcript of record:

> "27. The tax provisions of the charter of Augusta & Savannah Railroad and of Southwestern Railroad Company are both irrepealable and inviolable contracts with the State of Georgia. The said charter tax provisions do not constitute tax exemptions, but on the contrary provide for the taxation of said railroad properties. The said tax provisions specify the manner and the rate of taxation of said properties. It is expressly provided in said charters that said railroad properties shall not be subject to be taxed higher than one half of one per cent of their income. These provisions are mandatory and exclusive. It was intended that when said railroad properties were taxed in accordance with their charters such taxation would be exclusive of all other taxation of said property. *The tax imposed under the charter provisions relates to the specific railroad properties themselves; the provision of the charters is not that said corporations shall be taxed on their income, but that the specific railroad shall not be subject to be taxed higher than one half of one per cent on its income.*" . . . (Emphasis added)

These cases are not controlling in the case at bar for the additional reason as was held in the case of

> Wright vs. Georgia Railroad and Banking Company
> 216 U. S. 420

wherein the Georgia Railroad and Banking Company pleaded as res adjudicata the case of Georgia vs. Georgia Railroad and Banking Company 5[illegible] Ga. 423.

As to this plea the Supreme Court of the United States says:

> "But in Georgia R. & Bkg. Co. vs. Wright, 124 Ga. 596, 53 S.E. 251, the Supreme Court of Georgia seems to have definitely decided that a judgment in a suit to collect a tax assessed for one year is not a bar to a suit for taxes subsequently assessed for another year, although the question decided in the first case is the same question upon which the second suit must be also decided.
>
> "This court, as is well settled, accords to a judgment of a state only that effect given to it by the court of the state in which it was rendered. Union & Planters' Bank vs. Memphis, 189 U.S. 71, 47 L. ed. 712, 23 Sup. Ct. Rep. 604; Covington vs. First Nat. Bank, 198 U.S. 100, 49 L. ed. 963, 25 Sup. Ct. Rep. 562."
>
> "We shall therefore disregard this plea, and determine the matter upon its merits, giving to the decision of the Georgia court consideration only as an authority."

Although the record in the case of

> Wright vs. Central of Georgia Railroad Company
> 236 U. S. 674

is not in the record but the record of that case being in the records of the United States Supreme Court, it is a notable fact that the pleadings and judgment in that case show striking similarity to that of the case of

> Wright vs. L & N and the Atlantic Coast Line
> Railroad Company
> 236 U. S. 687.

the issues and the judgment being almost identical.

We call attention to the fact that in both the case of Wright vs. L. & N. and the Atlantic Coast Line Railroad Case, 236 U. S. 687, and that of Wright vs. Central of Georgia Railway Company U. S. 674, each decision was a five Judge one.

We quote from the vigorous dissent of Mr. Justice Hughes in the Central of Georgia case:

> "It has repeatedly been declared by this court to be settled law that tax exemptions, or *tax limitations*, are personal to the grantee; that is, nontransferable, and do not run with the property unless the legislature has explicitly provided otherwise. It has been held not to be enough that the grantee is authorized to make a conveyance of all its property, estate, privileges, and franchises."

citing numerous cases.

Again we call attention to the case of Central of Georgia Railway Company vs. Wright, 250 U. S. 519, which was also a five Judge decision.

IN CONCLUSION

Regardless of what dicta the courts may have used in the decisions cited by appellant in determining issues which did not include the issue of whether the State of Georgia could levy income tax against these corporations, the inescapable fact remains that a stock tax and an income tax are two separate and distinct taxes and an exemption or limitation of one is not an exemption of the other.

> "The stock . . . . shall be subject to a tax not exceeding one half of one percent. per annum on the net profits of their investments."

In view of the foregoing, we respectfully urge that the Appellant has shown no valid reasons to support its contention that the unanimous judgment of the Supreme Court

of Georgia is manifestly wrong and that it should be overruled. But on the contrary we think that Appellant's own argument and the cases it has cited demonstrate forcefully that the judgment of the Supreme Court of Georgia is manifestly right and should be affirmed by the Supreme Court of the United States.

Respectfully submitted.

EUGENE COOK,
Attorney General

VICTOR DAVIDSON,
Ass't. Atty. General

C. E. GREGORY, JR.,
Ass't. Atty. General

CLAUD SHAW,
Ass't. Atty. General

I, Victor Davidson, Assistant Attorney General of Georgia, certify that I have this day served Counsel for Appellant with copy of the foregoing brief by mailing same to T. M. Cunningham, Savannah, Georgia, Philip H. Alston, Atlanta, Georgia, and to Carl H. Davis, Wilmington, North Carolina.

This 11 day of January, 1947.

VICTOR DAVIDSON,
Assistant Attorney General.

FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 14 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 385

ATLANTIC COAST LINE RAILROAD COMPANY,

Appellant,

vs.

M. E. THOMPSON, STATE REVENUE COMMISSIONER,

Appellee.

No substitute

TO THE SUPREME COURT OF THE UNITED STATES:

The petition of Atlantic Coast Line Railroad Company, Appellant in the above stated case, respectfully shows:

1. Appellee, M. E. Thompson, State Revenue Commissioner became Lieutenant Governor, and qualified as such January 20, 1947, and, therefore, holds no longer the office of State Revenue Commissioner.

2. Article V, Section I, Paragraph IV, of the Constitution of 1945 of the State of Georgia provides that the General Assembly shall convene and open and publish returns for the election of Governor; "and the person having the majority of the whole number of

votes, shall be declared duly elected Governor of this State; but, if no person shall have such majority, then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice".

At the election for Governor held in November 1946, Honorable Eugene Talmadge received a majority of the whole number of votes cast at said election. However, he died before the General Assembly convened and opened and published the returns of the election. The General Assembly, upon opening and publishing the returns, declared that no person had received a majority of all the votes at said election; presumably on the theory that Honorable Eugene Talmadge being dead, he was no longer a person. There were two other persons voted for in said election besides Honorable Eugene Talmadge, one of them being his son, Herman Talmadge. The General Assembly thereupon elected by viva voce vote Herman Talmadge as Governor.

3. Article V, Section I, Paragraph I, of the Constitution of 1945 of Georgia, provides:

> "The executive power shall be vested in a Governor, who shall hold his office during the term of four years, and until his successor shall be chosen and qualified. The Governor serving at the time of the adoption of this constitution and future Governors shall not be eligible to

succeed themselves and shall not be eligible to hold the office until after the expiration of four years from the conclusion of his term of office."

Honorable Ellis Arnall, the retiring Governor, claiming that his successor had not been lawfully chosen and qualified, claimed the right to hold over as Governor. The Legislature duly declared M. E. Thompson elected as Lieutenant Governor. Article V, Section I, Paragraph VII, of the Constitution of the State of Georgia of 1945, provides "In case of the death, resignation, or disability of the Governor, the Lieutenant Governor shall exercise the executive power and receive the compensation of the Governor until the next general election for members of the General Assembly, at which a successor to the Governor shall be elected for the unexpired term."

Honorable Ellis Arnall resigned as Governor as soon as Honorable M. E. Thompson was declared the elected Lieutenant Governor. M. E. Thompson now claims that he has the right to exercise the executive power under the provision of the Constitution last above quoted.

4. Under the provisions of Section 92-8402 of the Annotated Code of Georgia, the State Revenue Commissioner is appointed by the Governor with the consent of the Senate, and his bond must be approved by the Attorney General. Honorable Herman Talmadge, claiming to be the legally elected Governor, has appointed Charles D. Redwine as State Revenue Commissioner, and his appointment has been approved by the Senate, and his bond has been approved by the Attorney General. Honorable M. E. Thompson,

claiming to be the acting Governor, has appointed Stonewall H. Dyer as State Revenue Commissioner, and his bond has been approved by the Attorney General, but the Senate has not consented to his appointment. The question as to who is the Governor of Georgia is now being litigated in the Courts, and the probability is that some time will elapse before that question is finally determined by the Supreme Court of Georgia.

5. The Legislature of the State of Georgia has provided by an act approved March 27, 1941, (Acts 1941; p. 516; Code Section 89-906, et seq. of the Annotated Code of Georgia of 1933), "That when any suit shall have been commenced by or against a public officer of this State in his official capacity and relating to the present and continuing duties of such office, the same shall in the event of the death, resignation, removal or expiration of the term of such officer while the suit is pending in the trial court and courts of review, survive in favor of or against his successors in office." A copy of the said Act of March 27, 1941, is hereto attached, marked Appendix "A".

6. This case involves the assessment of a deficiency tax under the Income Tax Law of Georgia. Code Section 92-3302 provides that the assessments of such deficiencies shall be made by the State Revenue Commissioner. The State Revenue Commissioner is charged with the administration and supervision of all the tax laws of the State. (Code Section 92-8427). The taxpayer has a right to protest the assessment under the provisions of Code Section 92-8432 and in the event the State Revenue Commissioner overrules the protest, the taxpayer has the right to appeal to the

Superior Courts of the State. (Code Sections 92-8426 (d); 92-8446). The Appellant in this case proceeded under the provisions of these Code Sections and appealed the assessment to the Superior Court of Chatham County, Georgia.

7. This Court also has power of substitution under the provisions of U.S.C.A., Title 28, Section 780, and Rule 19 of the Supreme Court of the United States.

8. Appellant cannot tell which of the two claimants to the office of State Revenue Commissioner is entitled to the office, and this question may not be settled before the argument of this case or before the decision of this case by the Court.

WHEREFORE, Appellant prays that both Charles D. Redwine, as State Revenue Commissioner, and Stonewall H. Dyer, as State Revenue Commissioner, may be now substituted in this case as Appellees in the place of Appellee, M. E. Thompson, as State Revenue Commissioner; and that when it shall be finally determined which of the two is lawfully entitled to the office of State Revenue Commissioner that the other may be stricken as Appellee.

This 11 day of February, 1947.

CARL H. DAVIS,

PHILIP H. ALSTON,

T. M. CUNNINGHAM,

Attorneys Atlantic Coast Line Railroad Company, Appellant.

I hereby certify that the facts stated in the foregoing petition are true and that a copy of this petition has been served on both Charles D. Redwine and Stonewall H. Dyer. This 12 day of February, 1947.

T. M. CUNNINGHAM.

Appendix "A"

"An Act to provide for the survival of suits commenced by or against public officers in their official capacity in favor of or against their successors in office in the event of death, removal, resignation or expiration of the term of such officers; to provide the procedure in such case; to provide that the provisions of this Act shall apply to pending litigation; to restrict the application of this Act; and for other purposes.

Be it enacted by the General Assembly of Georgia and it is hereby enacted by authority of the same:

Section 1. That when any suit shall have been commenced by or against a public officer of this State in his official capacity and relating to the present and continuing duties of such office, the same shall in the event of the death, resignation, removal or expiration of the term of such officer while the suit is pending in the trial court and courts of review, survive in favor of or against his successors in office.

Section 2. In such event the successor in office shall be made a party upon motion either in term time or vacation in whatever court the case shall be pending at the time, of which he shall be given reasonable notice. When the successor shall have been made a party in accordance with this act, the case shall thereupon proceed as if no change of parties had been made, provided that it shall be within the discretion of the court to allow the successor in office such time as he may deem necessary to appear, plead or otherwise proceed with such case.

Section 3. The provision of this Act shall apply to suits pending on the date of its approval, including all such actions that have not been formally dismissed even though the death, removal, resignation or expiration of the term of such public officer may have occurred prior to the date of the approval of this Act.

Section 4. The provisions of this Act shall not apply to actions against officers for damages on account of tortious acts committed by such officer colore officii, which survives against such officer or his personal representatives, notwithstanding the death, resignation, removal or expiration of the term of such officer.

Section 5. The provisions of this Act shall relate only to suits commenced by or against State officers in their official capacity and shall not relate or apply to suits commenced by or against municipal, district, or county officers.

Section 6. All laws and parts of laws in conflict with this Act be and the same are hereby repealed.

Approved March 27, 1941."

(Acts 1941, p. 516).

SUPREME COURT OF THE UNITED STATES

No. 385.—October Term, 1946.

Atlantic Coast Line Railroad Company, Appellant, v. Glenn S. Phillips, State Revenue Commissioner of the State of Georgia.	Appeal from the Supreme Court of the State of Georgia.

[June 23, 1947.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This was a proceeding in the courts of Georgia to declare invalid an assessment by the State Revenue Commissioner against the Atlantic Coastline Railroad Company on the ground that the tax as applied to the appellant impairs the obligation of contracts. United States Constitution, Art. I, Sec. 10.

To encourage railroad development, the State of Georgia in 1833 chartered the Georgia Railroad Company (which later became the Georgia Railroad and Banking Company), and gave the railroad certain immunity from taxation. Georgia's increasing need of tapping new sources of revenue has not unnaturally brought to the courts the scope of this immunity. Its construction in relation to the claim of Georgia that despite the charter of 1833 the appellant is subject to its corporate income tax is the sole issue before us.

The case is this. Georgia, in 1931, imposed a tax of 5½ percent on the net income of all domestic and foreign corporations. Acts 1931, Extra. Sess. pp. 24, 26, amended, Acts 1937, pp. 109, 117; Ga. Ann. Code § 92-3102. No claim under this corporate income tax was made against the Atlantic Coast Line, one of the lessees of the Georgia Railroad, until 1941. For the calendar years 1941, 1942, 1943, the State Revenue Commissioner assessed against

the appellant deficiency taxes on the basis of its net income from the road, computed at the 5½ percent rate paid by all corporations. It is this assessment that is contested. The appellant resisted on the ground that the attempt of Georgia to impose this tax is in disregard of the obligation assumed by Georgia through § 15 of the Charter of 1833. The Supreme Court of Georgia sustained the assessment, 38 S. E. 2d 774, by finding that the tax exemption of the charter related merely to the limits to which a tax on the railroad property could be levied; such a property tax to be measured so as not to exceed one-half percent of the net earning power of the properties. The exemption, so the State Supreme Court found, was not concerned with what we now know as a corporate net income tax and therefore did not bargain away the power of the legislature to impose such a tax.

A claim that a State statute impairs the obligation of contract is an appeal to the United States Constitution, and cannot be foreclosed by a State court's determination whether there was a contract or what were its obligations. But while it is true that we should not be bound by the construction of local statutes by the local courts in deciding the Constitutional question "yet when we are dealing with a matter of local policy, like a system of taxation, we should be slow to depart from their judgment, if there was no real oppression or manifest wrong in the result." *Clyde* v. *Gilchrist*, 262 U. S. 94, 97.

The Georgia Supreme Court had to construe the following Georgia language:

> "The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of said rail roads or any one of them; and after that, shall be subject to a tax not exceeding one half per cent. per annum on the net proceeds of their investments." § 15, Act of December 21, 1833, Acts 1833, p. 256, 263–64.

It is not for us to read such a local law with independent but innocent eyes, heedless of a construction placed upon it by the local court. Such a tax provision is not a collocation of abstract words. In seeking the meaning conveyed by a local enactment it must be viewed as part of the whole texture of local laws and of the economy to which they apply. The language draws to itself presuppositions not always articulated, and even what is expressed in words may carry meaning to insiders which is not within the sure discernment of those viewing the law from a distance. And so we are not prepared to say that the Supreme Court of Georgia was "manifestly wrong," *Hale* v. *State Board*, 302 U. S. 95, 101, in construing the exemption as limiting merely the right to impose property taxes. Our search is for something other than the meaning which the tax specialists may today find in the words. "It is for the meaning that at a particular time and place and in the setting of a particular statute might reasonably have acceptance by men of common understanding." *Hale* v. *State Board*, *supra*. We should reject the construction which the Georgia Supreme Court has placed upon what the Georgia Legislature of 1833 wrote only if we can be confident that the Georgia Legislature of 1833, by the words it used, could not have expressed the meaning thus attributed to it. A fair regard for the place of income taxes, as now commonly conceived, in the thought and practice concerning fiscal matters prevalent in 1833 precludes the rejection of the interpretation by the Georgia Court of the exemption of 1833.

There were, to be sure, so-called "faculty taxes" in Colonial times which had some of the characteristics of our present income taxes in that ability to pay was an ingredient. But even these taxes, hardly income taxes as we now know them, had generally ceased to be, and perhaps even to be remembered. See, *e. g.*, Seligman, The Income Tax (2d ed.) Part II, c. I, pp. 367 *et seq.*;

compare *Hylton* v. *United States*, 3 Dall. 171. In Georgia, the only imposition even remotely classifiable as an income tax because presumably based on ability to pay is that illustrated by a levy of "The sum of four dollars on all professors of law and physic, and the sum of fifty dollars on all billiard tables." Law No. 590, 1797, Watkins Digest of the Laws of Georgia, 1755-1799, pp. 646, 648. Not until the Civil War did Georgia, like the Federal Government, resort to what was indisputably an income tax. On the other hand, to read as the Georgia Supreme Court read the exemption provision of the Charter of 1833, as dealing with a tax on property, fairly reflects a practice, not unknown in the earlier days, of assessing property for tax purposes not by its exchange value but by its earning power. See, *e. g.*, Seligman, The Income Tax (2d ed.) pp. 382–83; Report of Special Commission on Taxation, Connecticut 1887, p. 9, with comments thereon in Kennan, Income Taxation p. 207.

In this setting, it would savor of dogmatism to infuse into the 1833 exemption the income tax atmosphere of our own day. It does not seem inadmissible for the Supreme Court of Georgia to have found that what the Georgia Legislature of 1833 sought was to measure the commonplace property tax of the time not by a flat sum, or on the basis of a value abstractly ascertained, but in accordance with the fruits of the property, modestly limited.

To sanction such a restricted reading of the exemption is to respect a rule deeply rooted in history and policy, according to which contracts of tax exemption are to be read "narrowly and strictly." *Hale* v. *State Board*, *supra*, at 109. To recognize that more than a hundred years ago the Georgia Legislature did not forever bargain away the wholly untapped domain of income taxation is to recognize the governing consideration that "The power of taxation is never to be regarded as surrendered or bar-

gained away if there is room for rational doubt as to the purpose." This was said when an earlier controversy affecting this charter was here. *Wright* v. *Georgia Railroad and Banking Co.*, 216 U. S. 420, 438. As to the astuteness of taxpayers in ordering their affairs so as to minimize taxes we have said that "the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it." *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, 395–96. This is so because "nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions." Learned Hand, C. J., dissenting in *Commissioner* v. *Newman*, 159 F. 2d 848, 851. Conversely, the State, insofar as it may limit its basic power to tax to enable government to go on, can sail as closely as astuteness permits to the line of an immunity from such exaction. This is an old canon of judicial construction. The policy on which it rests antedates the charter before us, and it forms the setting in which the exemption is to be read. See, *e. g.*, *Charles River Bridge* v. *Warren Bridge*, 7 Pick. (Mass. 1830) 344, affirmed, 11 Pet. 420 (1837). This requirement in the construction of legislative grants, especially tax exemptions, is merely an aspect of respecting legislative purpose. A legislature is not to be presumed to have relinquished its power of taxation beyond the narrowest rational reading of an exemption. The potential need of all governmental powers, and fairness in the distribution of burdens or in the enjoyment of privileges, preclude such an assumption.

We have carefully considered the earlier cases in which the scope of this exemption came before this Court. *Central Railroad and Banking Co.* v. *Georgia*, 92 U. S. 665; *Wright* v. *Georgia Railroad and Banking Co.*, *supra*; *Wright* v. *Central of Georgia R. Co.*, 236 U. S. 674; *Wright* v. *Louisville and Nashville R. Co.*, 236 U. S. 687; *Central of Georgia R. Co.* v. *Wright*, 248 U. S. 525; *Central*,

of Georgia R. Co. v. *Wright*, 250 U. S. 519. It is needless to rehearse the issues they involved. Suffice it to say that the prior taxes found to have been barred by the exemption were all taxes on the railroad property. Now for the first time we are called upon to examine a candid, conventional income tax. Passing reference to "income" when the Court's mind was not focused upon the validity of an income tax as such must not be torn from the context of discussion of property taxes. In any event, these phrases leave untouched our duty to respect the judgment of a State court as to the fair intendment of an exemption.

Judgment affirmed.

MR. JUSTICE RUTLEDGE, agreeing with the Court's conclusions concerning the meaning of the Georgia statute, concurs in the result.